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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2003

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Petitioner,

v.

WAYNE TURNER, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. SPAGNOLETTI
Attorney General
EDWARD E. SCHWAB
Deputy Attorney General
DONNA M. MURASKY*
Senior Litigation Counsel
**Counsel of Record*
OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA
441 4th Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667

TIMOTHY K. ARMSTRONG
STACEY H. KING
HOWREY SIMON ARNOLD & WHITE
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 783-0800
Attorneys for Petitioner

QUESTION PRESENTED

More than one hundred federal fee-shifting statutes give district courts "discretion" to fashion a "reasonable attorney's fee." The question presented is whether, as most Circuits have ruled, these fee-shifting statutes allow district courts to apportion a fee award among defendants, even when a prevailing plaintiff receives less than a fully compensatory fee award, or whether, as the D.C. Circuit has held, district courts have no discretion to apportion in this circumstance and must hold responsible for the entire fee award a relatively nonculpable defendant, even a defendant who aligned itself with plaintiff throughout the litigation.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that the parties to the proceeding are as follows:

District of Columbia Board of Elections and Ethics, *Petitioner*;

Wayne Turner, *Respondent*;

Yes on 59, *Respondent*;

Cornelius Baker, *Respondent*;

Steve Pardieck, *Respondent*;

Jim Graham, *Respondent*.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE D.C. CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS AS TO WHETHER FEDERAL FEE-SHIFTING STATUTES ALLOW A DISTRICT COURT TO APPORTION ATTORNEY'S FEES. 10

II. THE D.C. CIRCUIT'S DECISION DISALLOWING FEE APPORTIONMENT DOES NOT COMPORT WITH THIS COURT'S JURISPRUDENCE. 16

CONCLUSION 20

INDEX TO APPENDICES

Opinion of the United States Court of Appeals for the District of Columbia Circuit dated January 23, 2004 ..... 1a

Order of the United States Court of Appeals for the District of Columbia Circuit on Denial of Petition for Rehearing *En Banc*, March 10, 2004 ..... 17a

District Court's Memorandum and Order, January 8, 2003 ..... 18a

District Court's Order, February 14, 2003 ..... 23a

Magistrate Judge's Memorandum Opinion, October 23, 2001 ..... 25a

Magistrate Judge's Memorandum Opinion, July 24, 2001 ..... 40a

Magistrate Judge's Memorandum Opinion, March 21, 2001 ..... 57a

Text of Pertinent Statutory Provisions 67a

TABLE OF AUTHORITIES

Page(s)

CASES

Blanchard v. Bergeron, 489 U.S. 87 (1989) 18

Corder v. Gates, 947 F.2d 374 (9th Cir. 1991) 15

Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483 (11th Cir. 1987) 14, 15

Farrar v. Hobby, 506 U.S. 103 (1992)..... 16, 17

Firebird Society v. Members of Board of Fire Commissioners, 556 F.2d 642 (2d Cir. 1977) 13, 14

Hensley v. Eckerhart, 461 U.S. 424 (1983) 16, 17, 18

Herbst v. Ryan, 90 F.3d 1300 (7th Cir. 1996)... 12, 13

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989)..... 3, 16

Jones v. Espy, 10 F.3d 690 (9th Cir. 1993) 11, 12

Knights of Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984) 15

Koster v. Perales, 903 F.2d 131 (2d Cir. 1990) 14

Little Rock School District v. Pulaski County Special School District, 787 F.2d 372

(8th Cir. 1986) 15

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) 2

Sable Communications, Inc. v. Pacific Telephone & Telegraph Co., 890 F.2d 184 (9th Cir. 1989) 12

Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981) 10, 11

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2412(d) 2, 6, 11

42 U.S.C. § 1988 ..... 2, 6, 11

Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998) .. 4

RULES

S. Ct. R. 14.1(f) 2

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DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
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WAYNE TURNER, *ET AL.*,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner District of Columbia Board of Elections and Ethics respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) is reported at 354 F.3d 890. The order denying the petition for rehearing and for rehearing *en banc* (App. 17a) is reported at No. 03-7030, 2004 U.S. App. LEXIS 4658. The opinion of the district court relating to the attorney's fees at issue in this petition (App. 18a) and granting plaintiffs' motion to reconsider and awarding fees of $61,529 against the Board of Elections. The opinions of the magistrate judge relating to these fees

(App. 25a) are reported at 170 F. Supp. 2d 1, No. 98-2634, 2001 U.S. Dist. LEXIS 23437, and at 183 F. Supp. 2d 22.

JURISDICTION

The decision of the United States Court of Appeals was issued on January 23, 2004. Petitioner filed a timely petition for rehearing and rehearing *en banc* on Monday, February 23. It was denied on March 10, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The statutory provisions at issue are reproduced in the Appendix pursuant to S. Ct. R. 14.1(f). (App. 67a). They are the Civil Right Attorneys' Fee Act of 1976 (42 U.S.C. § 1988), and the Equal Access to Justice Act (28 U.S.C. § 2412(d)).

STATEMENT OF THE CASE

Congress has enacted more than 100 federal fee-shifting statutes granting district courts "discretion" to award a "reasonable attorney's fee" to prevailing parties. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986). Until the decision for which review is sought here, the Circuits, consistently with this Court's jurisprudence, had uniformly interpreted the language of the typical federal fee-shifting statute to permit district courts to apportion fees among defendants, based on considerations such as relative culpability and the relative time a plaintiff spent litigating against each defendant. The Circuits applied such an approach even when a district court determined that a reasonable attorney's fee was less than a fully compensatory fee.

The D.C. Circuit has now ruled as a matter of law that district courts do not have discretion to apportion in this circumstance. It thus has departed from the approach of its sister Circuits and has ignored this Court's admonition that "nothing" in federal fee-shifting statutes gives prevailing plaintiffs "hegemony over all the other rights and equities that exist in the world." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 n.4 (1989). And it has done so in a particularly compelling case for apportionment. Here, the defendant being held responsible for all fees not only aligned itself with plaintiffs from the outset of the litigation but also requested and received the relief it, along with plaintiffs, sought. It is being held fully responsible, moreover, because plaintiffs negligently failed to file a timely fee petition against the defendant which enacted the legislation causing plaintiffs harm; intervened as a defendant; and litigated to the hilt in the district court unsuccessful arguments against both plaintiffs and the defendant aligned with them.

A. The D.C. Medical Marijuana Initiative and the Barr Amendment

On September 17, 1998, the District of Columbia Board of Elections and Ethics ("the Board") certified Initiative 59, the District of Columbia Medical Marijuana Initiative, for placement on the November 3, 1998, District of Columbia general election ballot.[1]

In response, on October 21, 1998, Congress enacted Section 171 of the District of Columbia Appropriations Act

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[1] This Initiative was designed to allow chronically ill individuals to obtain and use marijuana for medical purposes under the care of a physician without violating the District of Columbia Uniform Controlled Substances Act.

for fiscal year 1999. Section 171, known as the Barr Amendment, specifically targeted Initiative 59, providing:

> None of the funds contained in [the District of Columbia Appropriations Act] may be used to conduct any ballot initiative which seeks to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act . . . or any tetrahydrocannabinols derivative.

Pub. L. No. 105-277, § 171, 112 Stat. 2681-150 (1998).

Because the ballots had already been printed and mailed, however, Initiative 59 remained on the ballot and was favorably voted upon by District residents in the election.

B. The District Court Proceedings

1. Filing of the Lawsuit

On October 30, 1998, just four days before the election, Wayne Turner and others ("Turner") filed a complaint challenging the Barr Amendment on First Amendment grounds. Turner further argued that the Barr Amendment did not apply to expenditures on post-election activities, and thus permitted the Board to release and certify the election results.

Following the election, the Board did not tabulate the votes on Initiative 59, based on the belief that such action would violate the Barr Amendment. As a result, the Board moved on November 6 for a declaratory judgment that the Barr Amendment was unconstitutional. The Board also requested expedited review and leave to tabulate and

announce the results in time for the November 18 Board meeting where all the election results were to be certified.

On November 6, Turner applied for a temporary restraining order and moved for a preliminary injunction directing the Board to release the results of the vote on Initiative 59. The Board did not oppose Turner's application or motion.

On November 9, the United States filed an opposition to Turner's requests. After a hearing, the district court denied Turner's requests.

2. The United States' Intervention as Defendant

On November 23, 1998, the United States moved to intervene as a defendant in the case. The court granted the motion on November 30.

That same day, all three parties moved for summary judgment. *Both* the Board and Turner urged that the Barr Amendment was unconstitutional and requested leave to announce and certify the election results. The United States, however, argued that the Barr Amendment was constitutional as a valid exercise of Congressional authority over the District of Columbia. On December 10, *both* the Board and Turner filed oppositions to the United States' motion for summary judgment, and the United States filed an opposition to *both* of their motions for summary judgment. On December 16, all three parties filed reply briefs. Again *both* the Board and Turner directed their reply briefs entirely to arguments opposing the United States' motion, and the United States argued against *both* their motions.

3. The District Court's Merits Decision.

On September 17, 1999, the district court construed the Barr Amendment as not prohibiting counting, releasing, or certifying the results of the vote on Initiative 59. A contrary construction, the district court reasoned, would have required it to invalidate the Amendment on constitutional grounds. The court granted the Board's November 6, 1998, motion for an order authorizing it to announce and certify the election results. Finally, the court granted Turner's motion for summary judgment insofar as it argued that the Barr Amendment did not prevent the Board from computing and certifying election results.

The United States did not appeal the decision.

4. Turner's Application for Attorney's Fees and the Magistrate's Decision

On March 31, 2000, Turner filed a petition for attorney's fees from the Board pursuant to 42 U.S.C. § 1988 and from the United States under 28 U.S.C. § 2412(d)(1)(A), the Equal Access to Justice Act ("EAJA").

Turner's request was referred to a magistrate judge who, on July 24, 2001, denied it under the EAJA because it had been filed *three and a half months* after the deadline for filing a fee request had run, and thus fell outside the "limited waiver" of federal sovereign immunity found in the EAJA.

Turner did not appeal the magistrate's decision but instead sought joint and several recovery of all legal fees from the Board. Turner argued that, irrespective of the United States' liability for attorney's fees, the Board was fully liable under section 1988 for *all* the fees he had incurred throughout the litigation. The Board opposed on the grounds that it had been a defendant in name only and, in fact, both it and Turner had been aligned throughout the proceedings and had prevailed.

The magistrate judge, on October 23, 2001, apportioned responsibility and expressly declined to impose joint and several liability. The magistrate found the United States was responsible for initially suppressing the election results and reasoned that it would be unfair to impose joint and several liability simply because Turner had failed to make a timely fee request against the United States.

The magistrate found the Board liable for $4,113 in fees.

5. The District Court's Order Apportioning Fees

Turner appealed the magistrate's apportionment of fees. He argued that the magistrate judge erred in apportioning attorney's fees and asked that the Board be found jointly and severally liable for all attorney's fees.

On January 8, 2003, the district court on *de novo* review found that Turner could have received a fully compensatory fee had he timely filed a request for fees from the United Sates under the EAJA. The court agreed that apportionment in this situation was a fair result.

The court did, however, increase the amount of fees the Board would be required to pay based on what the court determined were the three phases of the litigation: (1) the time period up to November 6, 1998, when the Board filed its first pleading; (2) post-November 6, 1998; and (3) the fee-application stage.

For the period up to November 6, the court found the Board responsible for 87% of Turner's fees. The court determined the Board was not wholly responsible because the United States was "solely responsible" for enacting the Barr Amendment, and thus was significantly responsible for

causing the election results to be suppressed and for instigating the litigation.

For the period after November 6, when the Board and Turner were allied in seeking to overturn the Barr Amendment, the court determined that the Board was not responsible for any fees because all further litigation was instigated solely by the United States.

Finally, for the fee-application stage, the court apportioned 47% of Turner's attorney's fees to the Board. The apportionment was based on the percentage of pages devoted to obtaining fees from the Board in Turner's application for fees.

C. The District of Columbia Circuit's Decision

Turner appealed. The D.C. Circuit ruled, as a matter of law, that district courts do not have discretion to apportion fee responsibility when apportionment would result in less than a fully compensatory fee award for a prevailing plaintiff. This factor, according to the court, trumps all other factors that district courts might otherwise fairly and equitably take into account. Accordingly, it held the Board jointly and severally liable for all of Turner's fees for the merits litigation.

REASONS FOR GRANTING THE WRIT

There is a conflict among the Circuits on the question whether a district court has discretion to apportion attorney's fees under the typical federal fee-shifting statute when apportionment results in a plaintiff not being fully compensated. Although other Circuits have determined that attorney's fees can be apportioned even where a plaintiff will obtain less than a full award, the D.C. Circuit has now held that such apportionment cannot occur.

Before this case, district courts had discretion in fashioning a reasonable fee award to take into account not only plaintiff's interest in receiving fees for a meritorious claim but also countervailing rights and equities. The courts strove to ensure not only that plaintiffs received a just award, but also that defendants were not held responsible for fees attributable to other defendants. The fact-specific case-by-case balancing of these competing values has been respected by the Circuits that review a district court's decision for an abuse of discretion.

The D.C. Circuit's decision upsets this traditional analysis in two related, but individually erroneous, respects. First, the D.C. Circuit held that failure to grant an award jointly and severally, resulting in plaintiff not being fully compensated, is an error of law despite other Circuits' holdings to the contrary. Second, the D.C. Circuit failed to take into account the language of the typical federal fee-shifting statute, this Court's prior holdings, and considerations of fairness and justice, instead applying a mechanistic rule.

In both of these respects, the D.C. Circuit's decision departs from the considered views of its sister Circuits. Review by this Court is necessary both to clarify the proper standard of appellate review of a district court's fee award under the typical federal fee-shifting statute and to specify the proper analytical methodology that should guide such awards by the district courts in the first instance. The better view, contrary to the decision below, respects the statutory "discretion" of the district court to award a "reasonable attorney's fee." Under this view, a district court may apportion a fee award, even if such apportionment results in less than a fully compensatory award, and limits appellate review to ascertaining whether the district court abused its discretion in balancing all the relevant rights and equities.

I. The D.C. Circuit is in Conflict With Other Circuits as to Whether Federal Fee-Shifting Statutes Allow a District Court to Apportion Attorney's Fees.

There is a conflict between the D.C. Circuit and its sister Circuits over whether a district court has discretion to apportion attorney's fees under federal fee-shifting statutes. The opinion below characterizes the issue as involving the question whether an award of fees under a federal fee-shifting statute that results in a plaintiff being less than fully compensated is an error of law. (App. 8a). Although the court below states that it would "normally defer to a thoughtful rationale of the district court so long as it achieved a result that was fair to the parties," it declined to review the district court's decision deferentially because, in the D.C. Circuit's view, the district court had adopted a "novel application of a comparative fault theory" that denies "the prevailing plaintiff a fully compensatory fee on a common set of claims against the defendants." (App. 8a).

The district court's rationale, however, was in no way a 'novel' approach to analyzing attorney's fees. To the contrary, the district court's analysis is quite harmonious with the decisions of other Circuits and is not an error of law.

The Ninth Circuit, for example, has held that apportionment determinations are best left to the discretion of district courts. In *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981), a pre-EAJA case, it upheld a lower court's award of a less than fully compensatory fee against the state defendant under section 1988 because the federal defendants were immune from fees. The district

court determined that the state defendant was responsible only for fees incurred in plaintiffs' case against the state defendant, not in plaintiffs' case against the federal defendants, and thus apportioned the fees accordingly. Plaintiffs appealed contending they were entitled to 100% of their fees from the state defendant. The Ninth Circuit disagreed, finding that the case did not involve a reduction in plaintiffs' fees, but rather reflected the fact that plaintiffs were entitled to fees only for their action against the state defendant. Because plaintiffs were not entitled to fees against the federal defendants, they could not recover them from the state. *See id.* at 1125.

In *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993), the court affirmed a district court's apportionment of attorney fees as between two defendants. The plaintiff had requested fees from the state defendant based on 42 U.S.C. § 1988 and from the federal defendant based on the EAJA. The district court apportioned fees rather than holding the defendants jointly and severally liable. Plaintiffs argued that by apportioning the fees, the federal defendant would not have to pay the full cost of plaintiffs' attorney fees, as section 2412(d) caps hourly fees, and thus plaintiffs would not be able to collect their "full" award unless they could collect the remainder of the fee award from the state defendant. The Ninth Circuit ruled that apportionment is "mandated in these situations in order to ensure that a defendant was not liable for a fee award greater than the actual fees incurred against that defendant." *Id.* at 691.[2]

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[2] The D.C. Circuit distinguished *Southeast Legal* and *Jones v. Espy* on the ground that they involved a separate claim against the United States. (App. 14a). However, as *Southeast Legal* states, plaintiffs in that case "prevailed on" only "their eighth claim, which challenged the FHWA [Federal Highway Administration] approval of the state's selection of a particular corridor for [a] . . . proposed highway as being violative of 23

Similarly, in *Sable Communications, Inc. v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184 (9th Cir. 1989), the Ninth Circuit ruled that a district court abused its discretion in determining the *extent* of a defendant's liability by holding the defendant jointly and severally liable for all of plaintiff's attorney's fees. The Ninth Circuit noted that a district court must "'insure a fair result for both parties.'" *Id.* at 194. The court noted that if a district court determines that one defendant's action was the focus of the litigation and required a larger portion of the plaintiff's attorney time, "it is appropriate to allocate the burden of the fee award accordingly." *Id.* at 194. Indeed, the court found a district court should take note of the extent of a defendant's culpability in determining fee awards. *See id.*

In *Herbst v. Ryan*, 90 F.3d 1300 (7th Cir. 1996), the Seventh Circuit also examined the question of allocation of attorney's fees. The court noted that the allocation of attorney's fees remains an "area in which there is no simple formula of universal applicability" and thus hesitated in assessing the wide variety of circumstances district courts face in determining proper allocations of fee awards. *Id.* at 1304. The court did, however, provide some guidance for informing a district court's discretion in determining the proper means of allocation in particular cases.

First, a district court should consider the broad purpose federal fee-shifting statutes play in ensuring the statute's goals. *See id.* Second, the court should determine whether the injury to the plaintiff is divisible among the defendants and, if not, what is the relative responsibility of

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U.S.C. § 128(a) . . ." 657 F.2d at 1125. And *Jones v. Espy* expressly held that plaintiffs' causes of action against the federal and state defendants were "inextricably intertwined." 10 F.3d at 692 n.2. Accordingly, these cases support the Board.

each defendant. *See id.* at 1305. The Seventh Circuit explained that, although it is frequently appropriate to hold defendants jointly and severally liable for attorney's fees:

> [C]ourts must be careful, however, to do so consistently with the preexisting background of substantive liability rules. However, joint and several liability is not appropriate in every case involving an indivisible injury. For instance, *it may be appropriate for the district court to apportion fees between an active instigator of a wrong and a more passive codefendant who had a more peripheral or ministerial role in the wrong.*

Id. (emphasis added; citations omitted). Third, the court should take into account other institutional concerns. *See id.* Finally, the court should make every effort to "'achieve the most fair and sensible solution that is possible.'" *Id.* (quoting *Grendel's Den v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984)).[3]

The Second Circuit has adopted a similar approach. In *Firebird Society v. Members of Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977) (*per curiam*), the Second Circuit affirmed the district court's decision not to award prevailing plaintiffs fees against a municipality for an aspect of the litigation. In *Firebird*, both the plaintiffs and the defendant successfully opposed a motion to intervene and set aside a consent decree. The district court decided not to

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[3] The D.C. Circuit cited *Herbst* for the principle that it " 'is frequently appropriate to hold all defendants jointly and severally liable for attorneys' fees in cases in which two or more defendants actively participated in a constitutional violation.'" (App. 12a). To be sure, *Herbst* made this statement but its holding and rationale explain the exceptions to that general principle and *upheld* fee apportionment as not constituting an abuse of discretion.

award plaintiffs fees against the municipality for this aspect of the litigation.

The Second Circuit upheld the district court decision, determining that because the municipality had "*joined in opposing intervention and as to that issue were as much prevailing parties as the [plaintiffs], [t]here is no viable theory advanced which would permit the recovery of legal fees and costs in these circumstances.*" *Id.* at 644 (emphasis added). In addition, the court noted that one of the crucial factors guiding its decision was that "in the early stages of this suit several crucial concerns of the plaintiffs were resolved by notable concessions of the defendants which minimized the risk of litigation." *Id.*

In *Koster v. Perales*, 903 F.2d 131 (2d Cir. 1990), in turn, the court held that a district court may allocate fee awards between the responsible parties, setting the percentage each party is liable for where culpability is unequal, or it may hold the responsible parties jointly and severally liable for the fee award. *See id.* at 139. Either way, however, "[t]he allocation of fee liability is a matter committed to the district court's discretion and will not be disturbed unless the determination evidences an abuse of discretion." *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1982)).

The Eleventh Circuit has similarly granted discretion to the district courts to determine when an award should be made joint and several and when it should be apportioned. In *Council for Periodical Distributors Ass'ns v. Evans*, 827 F.2d 1483 (11th Cir. 1987), the court stated that fees did not always need to be apportioned, particularly where two or more defendants actively participated in a constitutional violation. However, "in cases [where one defendant is not the prime instigator of the effort], it may be more appropriate

for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral or ministerial role in the wrong." *Id.* at 1487. Indeed, where one defendant is solely or largely responsible for a single claim within the litigation, the court may hold that defendant for all fees related to that claim. *See id.* at 1488. "The initial decisions of whether and how to apportion fees, however, is best done by the district court." *Id.* In apportioning the fees, the court instructs that the district court should make "'every effort to achieve the most fair and sensible solution that is possible.'" *Id.* (quoting *Grendel's Den*, 749 F.2d at 960).

In short, until the D.C. Circuit's decision here, the Circuits had uniformly held that a district court should be given the discretion to prescribe apportionment "when the time expended by the plaintiff in pursuing each defendant was grossly unequal." *Corder v. Gates*, 947 F.2d 374, 383 (9th Cir. 1991). *Accord Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 787 F.2d 372, 374 (8th Cir. 1986) (apportioning fees based on time expended in case involving intervenors); *Knights of Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 735 F.2d 895, 901 (5th Cir. 1984) (upholding a district court's allocation of 90% of fees to the federal government since the federal government played the major role in the dispute underlying the lawsuit).

These authorities make clear that, contrary to the opinion of the court below, the district court's approach to apportionment rested on a firm precedential basis and was in no meaningful sense "novel" nor, based on these authorities, was it an error of law. The D.C. Circuit's claim that apportionment is only justifiable where a claim is "fractionable" is erroneous and does not work. (App. 14a). To the contrary, the district court's apportionment here

would have been affirmed by the D.C. Circuit's sister Circuits.

II. The D.C. Circuit's Decision Disallowing Fee Apportionment Does Not Comport With This Court's Jurisprudence.

In its decision, the D.C. Circuit repeatedly made reference to *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), for the proposition that the district court must be reversed because Turner did not receive a fully compensatory fee award based on apportioning most of the fees to an immune defendant. (App. 9a, 10a).

To be sure, *Hensley* holds that district courts, barring special circumstances that would render an award unjust, should grant a successful civil rights plaintiff an award of attorney's fees. *See id.* at 429 (quoting H.R. Rep. No. 94-1558, at 1 (1976); S. Rep. No. 94-1011, at 4 (1976)). However, *Hensley* does not hold, and this Court has never held, that a prevailing plaintiff has a right to a fully compensatory award no matter what. Indeed, in *Hensley* this Court held that a prevailing plaintiff may *not* recover fees for time spent on distinct, unsuccessful claims. *See Hensley*, 461 U.S. at 440.

The D.C. Circuit's decision disregards this Court's admonition that "nothing" in federal fee-shifting statutes gives prevailing plaintiffs "hegemony over all the other rights and equities that exist in the world." *Indep. Fed'n of Flight Attendants*, 491 U.S. at 764 n.4. Instead, "the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account." *Id.*

For example, in *Farrar v. Hobby*, 506 U.S. 103 (1992), citing to *Hensley*, this Court noted that a district court

does have discretion to award low fees, or no fees, under federal fee-shifting statutes based on the facts of the case. *See id.*, at 118. The Court noted that in some circumstances, "even a plaintiff who formally 'prevails' under § 1988 should receive no attorneys' fees at all." *Id.* at 115.

In *Farrar*, the Petitioner was technically a "prevailing party" under the statute, but the Court reviewed the facts of the case and the outcome to determine whether Petitioner was entitled to a full award of attorney fees. Simply because the Petitioner was a prevailing party, this Court did not find a mechanistic application of the fee-shifting statute was required or even reasonable. In fact, the Court interpreted the statute as "expressly grant[ing] district courts discretion to withhold attorney's fees from prevailing parties in appropriate circumstances: [The statute] states that a court 'may' award fees 'in its discretion.'" *Id.* at 119 (O'Connor, J., concurring).

> While the exception to fee awards has often been articulated separately from the reasonableness inquiry, sometimes it is bound up with reasonableness: It serves as a short-hand way of saying that, even before calculating a loadestar or wading through all the reasonableness factors, it is clear that the reasonable fee is no fee at all. After all, where *the only* reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust, the reasonable fee is no fee at all.

Id. at 118. In other words, if this Court does require that all prevailing parties be entitled to a fully compensatory award of attorney's fees, the Petitioner in *Farrar* would not have been denied fees.

Admittedly, federal fee-shifting statutes aim to ensure effective access to the judicial process for persons with meritorious federal claims. *See Hensley*, 461 U.S. at 429. The fees to be awarded are not intended to be "windfalls" for plaintiffs, however, and the district courts maintain the discretion to determine what is reasonable based on the facts. *See Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). The application of the statutes is not to be "mechanistic," but rather based on district court factual determinations and discretion. The district courts' discretion in determining the amount of the award is appropriate because of its "superior understanding of the litigation" and the desirability of avoiding appellate review of what are generally factual determinations. *Hensley*, 461 U.S. at 437.

The district court in this case, with its superior understanding of the litigation, determined that the fees should be apportioned and that Turner's error in untimely filing his fee petition against the United States should not be used to shift fee responsibility to the Board. The Board stood with Turner throughout the litigation and fought the intervenor alongside Turner. Had the United States not become a party defendant, Turner would not have incurred the vast majority of the fees he incurred after the November 6, 1998 filing of the Board's request for declaratory judgment and Turner's motion for a temporary restraining order. In fact, both Turner and the Board were prevailing parties in this matter.

The D.C. Circuit reversed the lower court and held the Board jointly and severally liable because it determined that district courts should not have the discretion to apportion fees if the result would be less than a full compensatory award. It read a significant limitation on a district court's discretion to award fees under the typical federal fee-shifting statute by mandating a mechanistic view of fee awards. The

decision of the court below flies in the face of the discretion this Court has traditionally given district courts and applies a mechanistic rule whereby district courts must focus solely on the factor of whether an award is fully compensatory, thus taking away their traditional ability to weigh the facts of a case and providing a prescription for injustice.

In short, this Petition presents an important issue, the resolution of which is of considerable consequence to many other cases nationwide. It is necessary for the fairness of all parties involved to ensure that district courts are able to exercise their discretion in determining whether to apportion attorney's fees based on factors such as relative culpability and the like, or to hold defendants jointly and severally liable under federal fee-shifting statutes rather than to apply a simple mechanistic rule. The D.C. Circuit's decision improperly takes discretion away from the district courts in determining attorney's fees, despite the federal fee-shifting statutory language, this Court's prior holdings, and the holdings of other Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT J. SPAGNOLETTI
Attorney General
EDWARD E. SCHWAB
Deputy Attorney General
DONNA M. MURASKY
Senior Litigation Counsel
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA
441 4th Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667

TIMOTHY K. ARMSTRONG
STACEY H. KING
HOWREY SIMON ARNOLD & WHITE
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner District of Columbia Board of Elections and Ethics

JUNE 2004

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7030

WAYNE TURNER, ET AL.
v.
DISTRICT OF COLUMBIA BOARD OF ELECTIONS
AND ETHICS

Appeal from the United States District Court
For the District of Columbia
(No. 98cv02634)
Turner v. D.C. Board of Elections & Ethics,
170 F. Supp. 2d 1 (D.D.C. 2001)

Before: GINSBURG, ROGERS and TATEL,
Circuit Judges.
(Decided January 23, 2004)

MEMORANDUM OPINION OF THE COURT

ROGERS, *Circuit Judge.*

This appeal requires the court to determine what is a fully compensatory award under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, where the original defendant, aligning with the plaintiffs' constitutional challenge to a federal statute under 42 U.S.C. § 1983, leaves defense of the statute to the United States, as defendant-intervenor. The district court apportioned the requested

§ 1988 attorney's fees and expenses between the original defendant and the immune defendant based on considerations of comparative fault. In doing so, the district court approved a partial award to the prevailing plaintiffs only for the time prior to the original defendant's alignment with the plaintiffs' position, and no fees and expenses for the merits litigation thereafter. The district court also limited the award for the litigation to collect fees and expenses to the plaintiffs' efforts to collect under § 1988, excluding fees and expenses arising from efforts to collect from the immune defendant under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). On appeal, the prevailing plaintiffs contend that they were entitled to a "fully compensatory fee," *Hensley v. Eckerhart*, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), in light of their complete success on the merits, notwithstanding the original defendant's failure to oppose their lawsuit. We agree. The original defendant continued to deny the plaintiffs the only relief they sought throughout the litigation, and was jointly and severally liable with the United States for fees and expenses on the nonfractionable claims. Accordingly, we hold that the district court erred as a matter of law in apportioning fees and expenses on nonfractionable claims in the § 1983 litigation, and we vacate the judgment and remand the case to the district court to enter a fully compensatory award to the prevailing plaintiffs.

I.

A brief recitation of the underlying lawsuit giving rise to the request for attorney's fees is necessary. *See Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25 (D.D.C. 1999). When District of Columbia voters went to the polls on November 3, 1998, the ballot included Initiative 59, the Medical Marijuana Initiative, which sought voters' approval to legalize medical uses of marijuana for the chronically ill. *Id.* at 27. Two weeks before the election, on October 21,

1998, Congress enacted and the President signed the Barr Amendment to the District of Columbia Appropriations Act for Fiscal Year 1999. *See* Pub. L. No. 105-277, § 171, 112 Stat. 2681-150 (1998). The Barr Amendment prohibited use of the appropriated funds to "conduct any ballot initiative which seeks to legalize or otherwise reduce penalties associated with" a controlled substance. *Id.* The ballots for the November 3 election had been printed before enactment of the Barr Amendment, however, and District of Columbia voters voted on Initiative 59. *Turner*, 77 F. Supp. 2d at 27.

When the Board of Elections and Ethics refused, in light of the Barr Amendment, to release and certify the results of the vote on Initiative 59, five District of Columbia voters, including Wayne Turner, the official sponsor of Initiative 59 (hereinafter, together, "Turner"), sued the Board under 42 U.S.C. § 1983, seeking declaratory and injunctive relief. The complaint, filed October 30, 1998, and Turner's subsequent briefing alleged in the alternative that first, the Barr Amendment only limited the Board's capability to act until November 3, Election Day, and, therefore, the Board was required under D.C. Code Ann. § 1-1306 (1981) (now codified at D.C. Code Ann. § 1-1001.05 (2001)) to certify the results thereafter, see *Turner*, 77 F. Supp. 2d at 27, and second, to the extent the Barr Amendment prohibited the Board from performing its duty, the Amendment violated the First and Fifth Amendments of the United States Constitution. Three days after the election, Turner filed a motion for a temporary restraining order ("TRO") and a preliminary injunction. The same day, November 6, the Board filed a motion for a declaratory judgment supporting Turner's argument that the Barr Amendment was unconstitutional; the Board did not join the statutory argument.

The United States, having been notified of the lawsuit pursuant to 28 U.S.C. § 2403(a), filed an opposition to the TRO on November 9, pending a decision by the Solicitor General as to whether the United States would seek to intervene. The district court denied the TRO on November 10 and consolidated the preliminary injunction with the merits. The United States' unopposed motion to intervene, filed November 23, was granted on November 30. Following a hearing on the parties' cross-motions for summary judgment, the district court, on September 17, 1999, granted summary judgment to Turner, adopting his statutory argument in light of the principle of constitutional avoidance, for otherwise, the court opined, the Barr Amendment would have violated Turner's First Amendment rights. *Turner*, 77 F. Supp. 2d at 35. Neither the United States nor the Board appealed. Shortly thereafter, the Board counted the ballots and certified the results, which indicated that Initiative 59 had passed by 69% of the vote. See District of Columbia Board of Elections and Ethics, November 3, 1998 General Election, Election Results, Initiative Measure # 59 (votes counted Sept. 20, 2003), at http://www.dcboee.org/information/elec_1998/ini59_98.htm.

On March 31, 2000, after fee negotiations had proved unsuccessful, see Local Rule 215(b), Turner filed a motion for attorney's fees and expenses of approximately $134,000. Asserting that the Board and the United States were jointly and severally liable, Turner sought fees from the United States under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), and, in light of EAJA's statutory cap on hourly rates, *see id.* § 2412(d)(2)(A), also sought fees from the Board under 42 U.S.C. § 1988 for any amount exceeding the award under EAJA. A magistrate judge dismissed the EAJA request as untimely, see 28 U.S.C. § 2412(d)(1)(B), a determination to which Turner did not object, but permitted Turner to amend his motion to request

an award of all of his attorney's fees and expenses from the Board. *Turner v. District of Columbia Bd. of Elections & Ethics*, 183 F. Supp. 2d 22, 30-31 (D.D.C. 2001).

Addressing Turner's § 1988 request, the magistrate judge, see Fed. R. Civ. P. 54(d)(2)(D) & 72(b), found that Turner was a prevailing party and did not question the reasonableness of his counsel's hours and rates. The magistrate rejected, however, the view that the Board and the United States could be jointly and severally liable for Turner's attorney's fees and therefore apportioned fees and expenses based on comparative fault. *Turner v. District of Columbia Bd. of Elections & Ethics*, 170 F. Supp. 2d 1, 4-7 (D.D.C. 2001). The magistrate concluded that Turner was entitled to recover only $ 2,616 in fees for the period between October 30, 1998, when Turner filed his complaint, and November 6, 1998, when the Board filed its motion for a declaratory judgment ("pre-alignment period"). *Id.* at 8. For the pre-alignment period, the magistrate apportioned 90% of the culpability for the merits litigation to the United States inasmuch as the Board's decision to enforce the Barr Amendment was, in view of the District of Columbia's unique relationship with Congress, understandable. *Id.* at 7, 8. For the post-November 6 merits litigation ("post-alignment period"), the magistrate apportioned 100% of the culpability for that litigation to the United States. The magistrate reasoned that it was unfair to force the Board to pay attorney's fees and expenses for this period when Turner and the Board sought the same relief and Turner's counsel's work was directed against arguments presented only by the United States. *Id.* at 6. Finally, the magistrate awarded Turner fees of only $ 1,497 incurred in litigating the request for fees ("fees-for-fees"). *Id.* at 9. Because Turner had not allocated his counsel's time between the EAJA and § 1988 claims, the magistrate used the number of pages in Turner's fee motions directed at each claim as a proxy for allocating

the fees-for-fees to the United States and to the Board, finding that only 46% of Turner's counsel's fees work could be ascribed to the Board. *Id.* The magistrate again, however, in light of his culpability finding, awarded Turner only 10% of the fees-for-fees incurred against the Board. *Id.* at 9. Turner, but not the Board, filed objections to the magistrate's partial award.

On *de novo* review, *see* Fed. R. Civ. P. 54(d)(2)(D) & 72(b), 28 U.S.C. § 636(b)(1), the district court adopted the magistrate's comparative-fault apportionment but increased Turner's partial award against the Board to $ 39,815. The district court concluded, in recognition of § 1988's purpose of encouraging private attorneys general to bring meritorious lawsuits to vindicate citizens' rights, that the reasonable amount of fees should be reduced only minimally. The district court awarded Turner 87% of his fees request ($ 24,000) for the pre-alignment period plus expenses of $ 569. The district court denied Turner any award for the post-alignment period for the remainder of the merits litigation. For the fees-for-fees period, the district court awarded Turner 46% of his request, or $ 15,246, based on the pages proxy, absent a complete allocation by Turner of time between the § 1988 and EAJA claims, but with no reduction for comparative fault. Upon reconsideration, the district court awarded Turner $ 21,714 for fees-for-fees work following the magistrate's decision, bringing the total partial award to $ 61,529.

II.

On appeal, Turner contends that the district court erred as a matter of law in awarding only a portion of his request for attorney's fees and expenses under § 1988 based on apportioning most of the fees to an immune defendant. Because the Board did not object either to his status as a

prevailing party or to the reasonableness of his counsel's rates or hours, and did not cross-appeal on these issues, Turner maintains, and we agree, that there are no disputed issues of fact before this court. Thus, the only question before the court is for which parts of Turner's § 1983 lawsuit the Board may properly be held accountable for attorney's fees and expenses, and whether joint and several liability applies.

Longstanding precedents establish that plaintiffs who have achieved excellent results in civil rights litigation should normally receive a fully compensatory attorney's fee. Section 1988 provides in pertinent part that in any suit pursuant to 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). The plaintiff, however, bears the burden of establishing both entitlement to an award of attorney's fees as well as the amount properly due. *Hensley*, 461 U.S. at 437; *Covington v. District of Columbia*, 313 U.S. App. D.C. 16, 57 F.3d 1101, 1107 (D.C. Cir. 1995). The Supreme Court has described § 1988's purpose as safeguarding "effective access to the judicial process" for persons with civil rights grievances such that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley*, 461 U.S. at 429 (quoting H. R. Rep. No. 94-1558, at 1 (1976); S. Rep. No. 94-1011, at 4 (1976)). In order to attract competent counsel to serve as private attorneys general on behalf of plaintiffs, who are "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," *Miller v. Staats*, 227 U.S. App. D.C. 299, 706 F.2d 336, 340 (D.C. Cir. 1983) (citations omitted), it has long been established that "in computing the [§ 1988] fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " *Hensley*, 461 U.S. at 430

n.4 (quoting S. Rep. No. 94-1011, at 6 (1976)). Thus, § 1988 "grants the successful civil rights plaintiff a 'fully compensatory fee.' " *Missouri v. Jenkins*, 491 U.S. 274, 286, 105 L. Ed. 2d 229, 109 S. Ct. 2463 (1989) (quoting *Hensley*, 461 U.S. at 435); *see also Covington*, 57 F.3d at 1109.

Although "a request for attorney's fees should not result in a second major litigation," and "the district court has discretion in determining the amount of a fee award" because of its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters," *Hensley*, 461 U.S. at 437 (emphasis added), "it is now axiomatic that ... the discretion of a district court in deciding whether to award such fees to a prevailing party is narrowly limited." *Consumers Union of U.S., Inc. v. Virginia State Bar*, 688 F.2d 218, 222 (4th Cir. 1982) (citing *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979)) (emphasis added); accord *Miller*, 706 F.2d at 340. Where, as here, the issues involved are not questions of fact but of law regarding the appropriateness of apportionment, this court's review is de novo. *See Jacobs v. Schiffer*, 340 U.S. App. D.C. 221, 204 F.3d 259, 264 (D.C. Cir. 2000).

This court normally would defer to a thoughtful rationale of the district court so long as it achieved a result that was fair to the parties, *see Williams v. First Gov't Mortg. & Investors Corp.*, 343 U.S. App. D.C. 222, 225 F.3d 738, 747 (D.C. Cir. 2000), but we are constrained to take a closer look at this § 1988 fees appeal in light of the novel application of a comparative fault theory based on tort law, *see Turner*, 170 F. Supp. 2d at 5-6 (citing Restatement (Second) of Torts § 192). Here, the district court, in adopting the magistrate's analysis, see id. at 6-9, applied its view of comparative fault in the sense that the Barr Amendment placed the Board in a difficult position of either having to enforce the Amendment or risk defying Congress to which it

is ultimately responsible, see U.S. Const. art. I, § 8, cl. 17, and which controls its appropriations, see D.C. Code § 1-204.46. The district court concluded that a reasonable fee must take into account the fact that the United States was primarily at fault. In developing this comparative fault theory, the magistrate and the district court relied on *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984), in which the First Circuit suggested relevant factors for allocating fees among defendants. While a source of guidance for jointly and severally liable defendants, *Grendel's Den* provides no support for apportioning § 1988 fees liability so as to deny the prevailing plaintiff a fully compensatory fee on a common set of claims against the defendants. *Id.* Indeed, the First Circuit, in citing its own authority, among others, recognized that it was not unjust to assess fees against a governmental entity stuck with enforcing a law ultimately found to be unconstitutional on its face even where it did not enact the law and where some other entity may be more culpable or causally responsible. *Id.* (citing *Venuti v. Riordan*, 702 F.2d 6, 8 (1st Cir. 1983)).

Turner contends that the district court abused its discretion, *see Jacobs*, 204 F.3d at 264; *Nat'l Black Police Assn v. D.C. Bd. of Elections & Ethics*, 335 U.S. App. D.C. 17, 168 F.3d 525, 529 (D.C. Cir. 1999), by failing to award him a "fully compensatory award" where there are no "special circumstances [that] would render such an award unjust." *Hensley*, 461 U.S. at 435, 429. Specifically, Turner maintains that for the pre-alignment period the district court erred as a matter of law in denying his full fees even though the Board was the only defendant. For the post-alignment period, Turner contends that the Board, notwithstanding its alignment with his constitutional challenge, continued to be his adversary throughout the merits litigation because, although it could have settled in light of its position that the Barr Amendment was unconstitutional, it continued to

enforce the Amendment, denying Turner his sought relief. Moreover, while acknowledging that for the fees-for-fees period he seeks to recover against the Board only the fees that are attributable to his efforts under § 1988 and not for time devoted to EAJA collection from the United States, Turner contends that there is no authority to apportion § 1988 fees and expenses when the result is, as here, to deny a successful plaintiff any fees for his attorneys' work on the merits, other than a fractional fee for the first week after the complaint was filed. By so doing, Turner maintains the district court's fee award undermines "the premium that the Civil Rights Act places on litigants as private attorneys general," *Boos v. Barry*, 704 F. Supp. 5, 9 (D.D.C. 1989), by enabling ordinary citizens to obtain counsel to litigate meritorious civil rights cases.

Although the Board attempts for the first time on appeal to contend that it, too, was a prevailing party, that argument is not properly before the court. *See United States v. Hylton*, 352 U.S. App. D.C. 332, 294 F.3d 130, 135 (D.C. Cir. 2002). There is no basis to conclude that the Board was not "the party legally responsible for relief on the merits," *Kentucky v. Graham*, 473 U.S. 159, 164, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985), as only it, and not the United States, could certify the votes on Initiative 59. Results, not litigating positions, are determinative of prevailing party status. *Hensley*, 461 U.S. at 435. Turner incurred and continued to incur attorney's fees and expenses because the Board refused to certify the election results. *See Nationwide Bldg. Maintenance, Inc. v. Sampson*, 182 U.S. App. D.C. 83, 559 F.2d 704, 710 (D.C. Cir. 1977) (citing *Communist Party of U.S. v. Department of Justice*, No. 75-1770, slip op. at 3 (D.D.C. Mar. 23, 1976)); *see also Cuneo v. Rumsfeld*, 180 U.S. App. D.C. 184, 553 F.2d 1360, 1365 (D.C. Cir. 1977), overruled on other grounds by *Burka v. United States Dept. of Health and Human Services*, 330 U.S. App. D.C. 59, 142

F.3d 1286, 1288 (D.C. Cir. 1998). Hence, the Board's claim of "alignment" with Turner in challenging the Barr Amendment fails to show exceptional circumstances to excuse its failure to raise this argument in the district court. *See Hylton*, 294 F.3d at 135.

Our analysis of Turner's § 1988 request proceeds on the basis of four well-settled propositions of law on which Turner relies. First, because an award of attorney's fees under § 1988 "is not meant as a 'punishment' for 'bad' defendants who resist plaintiffs' claims in bad faith[,] [but] is meant to compensate civil rights attorneys who bring civil rights cases and win them," *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982), the fact that it was not the "fault" of the Board of Elections that the Barr Amendment was enacted by Congress and that Turner had to litigate to get the Board to count the votes on Initiative 59 is not a "special circumstance" warranting denial of a fully compensatory fee. Second, it is irrelevant for purposes of § 1988 that Congress, and not the Council of the District of Columbia, enacted the Barr Amendment, because under 42 U.S.C. § 1983 the Amendment is treated as a District of Columbia law. Third, in light of *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980), and *King*, 691 F.2d at 602, because the Board continued to enforce the Barr Amendment throughout Turner's § 1983 litigation, it is irrelevant for purposes of § 1988 that in court the Board supported Turner's constitutional challenge to the Barr Amendment. Fourth, because the Board's liability for § 1988 fees is not derivative of the United States', it is irrelevant that Turner did not timely seek attorney's fees under EAJA, for [HN9] the immunity of one defendant does not reduce the liability of a non-immune co-defendant. *See Graham*, 473 U.S. at 164-65; *Supreme Court of Va.*, 446 U.S. at 739.

To ensure that a private attorney general is fully compensated, "it is frequently appropriate to hold all defendants jointly and severally liable for attorneys' fees in cases in which two or more defendants actively participated in a constitutional violation." *Herbst v. Ryan*, 90 F.3d 1300, 1305 (7th Cir. 1996) (citing *Koster v. Perales*, 903 F.2d 131, 138 (2d Cir. 1990)). Moreover, in order to serve the remedial purposes of the Civil Rights Act, "a number of courts have upheld the imposition of joint and several liability for a fee award where there existed a question as to whether the fee would be collectible from one of the defendants." 90 F.3d at 1306 n.13; *see also Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 285-86 (3d Cir. 1983); *Riddell v. Nat'l Democratic Party*, 712 F.2d 165, 168-169 (5th Cir. 1983). Thus, in this circuit, a plaintiff's fully compensatory fee for claims "centered on a set of common issues" against two or more jointly responsible defendants should be assessed jointly and severally. *Action* on Smoking & Health v. Civil Aeronautics Bd., 233 U.S. App. D.C. 79, 724 F.2d 211, 216 (D.C. Cir. 1984) (hereinafter *"ASH"*). On the other hand, if claims are not attributable to all defendants and are not "centered on a set of common issues," i.e., claims that are "truly fractionable," *id.*, fees should be apportioned, "in order to ensure that a defendant is not liable for a fee award greater than the actual fees incurred against that defendant," *Jones v. Espy*, 10 F.3d 690, 691 (9th Cir. 1993).

The Supreme Court has acknowledged that "fee awards against enforcement officials are run-of-the mill occurrences." *Supreme Court of Va.*, 446 U.S. at 739. "Mere" enforcers of unconstitutional laws may be held liable for attorneys' fees even if their involvement in the litigation has been minor or they have argued that their enforcement actions are improper and have lobbied for the underlying law to be changed. *See id.; cf. Carhart v. Stenberg*, 192 F.3d 1142, 1152 (8th Cir. 1999), *aff'd*, 530 U.S. 914, 147 L. Ed.

2d 743, 120 S. Ct. 2597 (2000). Congress has determined that the greater wrong would be to leave unpaid the attorney's fees and expenses of a successful § 1983 plaintiff who has undertaken significant risks and expenses to vindicate constitutional rights. *See Carhart*, 192 F.3d at 1152. As this court observed, "the determinative factor must be the role of plaintiffs' lawsuit, not the motivations of the defendant." *Miller*, 706 F.2d at 343.

Section 1988 does not permit a court to inquire into defendants' comparative fault where to do so obstructs Congress' purpose of compensating successful private attorneys general. *King*, 691 F.2d at 602. Even accepting the district court's view that the Board's blameworthiness was relatively slight compared to that of the United States, the Board's § 1988 liability may not, to the prevailing plaintiffs' detriment, be reduced on the nonfractionable claims against the defendants. State actors "may have had good-faith reasons for their acts, but that is no reason to deny the [plaintiff] attorney's fees." *Id.* The district court's reservations about holding District of Columbia officials fully responsible for their enforcement of the Barr Amendment are therefore misplaced. The unique relationship between Congress and the District of Columbia under the Constitution simply means that there will be occasions when the District of Columbia government must pay attorney's fees for successful § 1983 lawsuits challenging laws that the District Government did not enact, for any Act of Congress that is solely applicable to the District of Columbia is a law of the District of Columbia for § 1983 purposes. Consistent with the court's duty to ensure that a successful § 1983 plaintiff is awarded a fully compensatory fee, then, § 1988 fee awards based on a nonfractionable claim may not be apportioned between an immune "losing party," *see Graham*, 473 U.S. at 164, who cannot be made to pay, and a non-

immune losing party that is jointly and severally liable for the former's share of an attorney's fee award.

As previously explained, joint and several liability exists for all defendants on the non-fractionable claims, *see Herbst*, 90 F.3d at 1305; it is only when there are fractionable parts of a lawsuit not fairly attributable to other parties that liability for attorney's fees and expenses may be apportioned exclusively to the party who caused the plaintiff to incur those costs, see *Action on Smoking & Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 216. Turner's § 1983 lawsuit to obtain a preliminary injunction and declaratory judgment against the Board and, once it intervened, against the United States centered on a common set of issues: namely, the Board's refusal to count and certify the votes on Initiative 59. While the United States' intervention as a defendant affected the course of the proceedings, there was not a separate claim against the United States, *compare Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125 (9th Cir. 1981); *Jones*, 10 F.3d at 692 n.2, as is clear from the fact that if the United States had not intervened, Turner would have been required to litigate the merits of his § 1983 claim so long as the Board continued to enforce the Barr Amendment. The magistrate's finding, adopted by the district court, stated there is nothing to indicate that, but for the United States' intervention, the Board would have unilaterally stopped enforcing the Amendment. *See Turner*, 170 F. Supp. 2d at 7. Because the United States enjoys sovereign immunity over the share of Turner's fees it otherwise would bear, the Board, as a jointly and severally liable losing party, must pay all attorney's fees associated with the non-fractionable claim, here consisting of the entire litigation from the date Turner filed his complaint to the date he obtained summary judgment.

By contrast, as Turner acknowledges, his fees-for-fees litigation is fractionable. Because it involves distinct

claims, i.e., different statutes with different standards of proof, Turner correctly seeks only to recover fees-for-fees from the Board based on his § 1988 claim against the Board and not based on his EAJA claim against the United States. *Compare* 42 U.S.C. § 1988(b) *with* 28 U.S.C. § 2412(d)(1)(A). For the fees-for-fees litigation, Turner's counsel engaged in separate research on each statute and generated a separate argument about how each party's role in the suit rendered it liable to a prevailing party's claim for attorney's fees. *See Turner*, 170 F. Supp. 2d at 9. His counsel's hours therefore can be "easily compartmentalized," *ASH*, 724 F.2d at 216, preventing Turner from recovering fees-for-fees against the Board for his EAJA claim.

We therefore hold that the district court (and the magistrate judge) erred as a matter of law by using considerations of comparative fault in apportioning Turner's § 1988 request for attorney's fees and expenses on a non-fractionable claim between the non-immune Board and the immune United States. Because there is no issue regarding the reasonableness of his counsel's hours and rates, Turner was entitled to recover 100% of the fees and expenses incurred for the merits litigation. In the pre-alignment period, the United States was not a party and hence there was no basis for limiting Turner's recovery to 87%. In the post-alignment period, the Board continued to enforce the Barr Amendment, denying Turner the sole relief that he sought in his litigation; the Board neither certified the results nor settled the case. By contrast, Turner's claims for fees-for-fees under § 1988 and EAJA are fractionable, and the district court, using motions pages as a proxy for any other allocation, properly apportioned the fees between the Board and the United States. Accordingly, we vacate so much of the order as awarded Turner only a partial award of his attorney's fees and expenses under § 1988 for the § 1983

merits litigation, and remand the case to the district court to enter a fully compensatory award.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7030

WAYNE TURNER, ET AL.,
LARRY BRUNI, M.D.,
v.
DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Before: GINSBURG, EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, and ROBERTS,
Circuit Judges.
(Filed March 10, 2004)

ORDER

Upon consideration of appellee District of Columbia Board of Elections and Ethic's petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2634

WAYNE TURNER, ET AL.
v.
D.C. BOARD OF ELECTIONS AND ETHICS

Before: ROBERTS,
United States District Judge.
(Filed October 8, 2003)

MEMORANDUM OPINION AND ORDER

ROBERTS, *United States District Judge.*

The United States Magistrate Judge to whom plaintiffs' request for attorneys' fees was referred awarded plaintiffs fees in the total amount of $4,113 and plaintiffs filed objections to the award. Following *de novo* review of the fee request, plaintiffs are awarded attorneys' fees in the total amount of $39,815.

BACKGROUND

The background of the underlying dispute is set forth fully in the Memorandum Opinion issued September 17, 1999 and in the Memorandum Opinion signed by the Magistrate Judge on October 23, 2001. Briefly, ballots in the District of Columbia for the November 1998 election

included an initiative that, if adopted by the voters, would allow certain individuals to obtain marijuana for medicinal purposes. After the ballots were printed but before the election took place, Congress passed the Barr Amendment which prohibited the District of Columbia from using funds to conduct a ballot initiative that sought to legalize the use of any controlled substance, including marijuana.

On October 30, 1998, plaintiffs filed this lawsuit challenging the Barr Amendment under, *inter alia*, 42 U.S.C. § 1983 (2000). The District of Columbia Board of Elections and Ethics (the "Board") was the only defendant named by plaintiffs in their lawsuit.

On November 6, 1998, the Board filed a motion asking the Court to declare the Barr Amendment in violation of the First Amendment, thereby aligning itself with plaintiffs. On November 9, 1998, plaintiffs sought a temporary restraining order. That same day, the united States opposed plaintiffs' motion and shortly thereafter intervened as an adverse party to defend the constitutionality of the Barr Amendment.

Plaintiffs prevailed on their challenge to the Barr Amendment. Their request for fees against the United States under the Equal Access to Justice Act ("EAJA") was denied as untimely. Their request for fees against the Board under 42 U.S.C. § 1988 was referred to a Magistrate Judge who awarded $4,113.

DISCUSSION

The Magistrate Judge's fee award is reviewed *de novo*. 28 U.S.C. § 636(b)(1).

The prevailing party in an action filed pursuant to 42 U.S.C. § 1983 may recover a reasonable attorneys' fee. 42 U.S.C. § 1988. The party requesting fees has the burden of establishing entitlement to fees and the proper amount of fees. See Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995). The Magistrate Judge determined that plaintiffs were entitled to recover attorneys' fees under § 1988 and no objections to that determination have been filed. Plaintiffs qualify as prevailing parties on their § 1983 claim.

The remaining dispute is this case involves the amount of plaintiffs' fees which should be assessed against the Board. Plaintiffs insist that the Board should pay the full amount of plaintiffs's fees incurred in the case. The Board contends that the fees should be apportioned and that it should pay a small percentage of the total fees requested. The Magistrate Judge agreed with the Board.

For the reasons discussed and under the cases cited by the Magistrate Judge in his Memorandum Opinion, apportionment is appropriate in this case. The court deciding a fee application should "make every effort to achieve the most fair and sensible solution that is possible." See Grendel's Den Inc. v. Larkin, 749 F.2d 945, 960 (1st Cir. 1984). Plaintiffs argue that they are entitled under § 1988 to recover a fully compensatory fee. Their ability to recover a fully compensatory fee, however, is impeded by their failure to have filed their request for fees from the United States under the EAJA in a timely manner. The Board should not be required to pay fees incurred during litigation on the merits after it requested a ruling from the Court that the Barr Amendment was unconstitutional. After that date - - November 6, 1998 - - the Board was aligned with plaintiffs on the merits and the plaintiffs' only adversary was the United States which intervened to defend the Barr Amendment.

The record shows that attorneys Graham Boyd, Art Spitzer and Aaron O'Toole spent 69.9 hours, 13.6 hours, and 24 hours respectively, working on this case through November 6, 1998. Using the most recent Laffey matrix,[1] Boyd's hours are paid at the rate of $265 per hour, Spitzer's hours are paid at the rate of $370 per hour, and O'Toole's hours are paid at the rate of $175 per hour. Plaintiffs, then, incurred attorneys' fees of $27,755.50 plus $569 in expenses through November 6, 1998.

The amount of attorneys' fees to be awarded in a given case, however, is that which is reasonable. 42 U.S.C. § 1988(b). Indeed, "'reasonableness' is the overarching standard by which a fee award is to be measured, and it is to be determined by a district court 'in light of all the circumstances' of a case." McKenzie v. Kennickell, 875 F.2d 330, 333 (D.C. Cir. 1989) (citing Blanchard v. Bergeron, 489 U.S. 87, 96 (1989)). The United States in this case was solely responsible for enacting the challenged legislation and was significantly responsible for causing the election results to be suppressed. As a result, it is appropriate to reduce the amount of fees assessed against the Board to arrive at a reasonable fee for which it should be responsible. In recognition of § 1988's purpose of encouraging private attorneys general to bring meritorious lawsuits to vindicate citizens' rights, however, the amount by which the fee is reduced should be minimal. Based on the foregoing, a reasonable fee to be assessed against the Board in this case is $24,000, plus expenses in the amount of $569.

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[1] Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983). Because compensation received many years after the work was performed "is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, . . . an appropriate adjustment for delay in payment - - whether by the application of current rather than historic hourly rates or otherwise - - is within the contemplation of [§ 1988]." Missouri v. Jenkins, 491 U.S. 274, 283-84 (1989).

Plaintiffs are also entitled to recover the fees incurred in connection with their request for fees from the Board under § 1988. Plaintiffs claimed $33,144.50 in attorneys' fees for work devoted to the request for fees from the Board under § 1988 and the request for fees from the United States under the EAJA. However, before the Magistrate Judge, plaintiffs failed to fully allocate time between the § 1988 and EAJA claims. The Board should not be billed for plaintiffs' work on fee arguments that were applicable only to the United States and that did not prevail. The Magistrate Judge found that 46% of the substantive portions of plaintiffs' briefs addressed the § 1988 claim, and he apportioned these fees guided by that percentage. That basic principle was not unreasonable. Since plaintiffs have still provided no complete allocation of time between the two claims, they will be awarded 46% of the fees sought, or $15,246.

CONCLUSION

Plaintiffs are entitled to recover from the Board $24,569 for fees and expenses incurred on or before November 6, 1998, plus $15,246 for fees incurred in connection with their fee request. Accordingly, it is hereby

ORDERED that defendant District of Columbia Board of Elections and Ethics pay plaintiffs $39,815.

SIGNED this 8th Day of January, 2003.

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2634

WAYNE TURNER, ET AL.
v.
D.C. BOARD OF ELECTIONS AND ETHICS

Before: ROBERTS,
United States Disrict Judge.
(Filed February 14, 2003)

ORDER

ROBERTS, *United States District Judge.*

Plaintiffs filed a motion for reconsideration of the fee award entered January 8, 2003. Specifically, plaintiffs seek additional fees for the work performed on their fee request after the decision by the United Sates Magistrate Judge. Defendant has neither filed any opposition to plaintiffs' motion nor requested an extension of time in which file its response. Because plaintiffs are entitled to recover the fees incurred after August 20, 2001 in connection with the fee request, and because the current *Laffey* matrix rates are appropriate, it is hereby

ORDERED that plaintiffs' motion for reconsideration of fee calculations be, and hereby is, GRANTED. The fee award entered January 8, 2003 is vacated. It is further

ORDERED that attorneys' fees and expenses in the total amount of $61,529 be, and hereby are, awarded in favor of plaintiffs and against the District of Columbia Board of Elections and Ethics.

SIGNED this 14th day of February, 2003.

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2634

WAYNE TURNER, ET AL.
v.
D.C. BOARD OF ELECTIONS AND ETHICS

Before: FACCIOLA,
United States Magistrate Judge.
(Filed October 23, 2001)

MEMORANDUM OPINION

FACCIOLA, *United States Magistrate Judge.*

This matter is before me for resolution of plaintiffs' Motion for Attorneys' Fees and Expenses against defendant District of Columbia Board of Elections and Ethics ("the Board") and the intervenor and defendant, the United States. My Memorandum Opinion and Order of July 24, 2001, denied plaintiffs' motion with respect to the United States under the Equal Access to Justice Act, 28 U.S.C. A.§ 2412(d)(1)(A)(1994)("EAJA"), and I now address the Board's liability under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (1994).

BACKGROUND

The underlying facts of this dispute have been detailed in Judge Roberts' Order of September 17, 1999.

Turner v. District of Columbia Bd. of Elections and Ethics, 77 F.Supp.2d 25 (D.D.C. 1999). The Board placed on the ballot for the November, 1998, election an initiative that would afford seriously ill individuals the right to obtain marijuana without violating the criminal provisions of the D.C. Code. On October 21, 1998, however, Congress passed what has become known in this lawsuit as the Barr Amendment (after its sponsor), which prohibited the use of funds contained in the District of Columbia Appropriations Act to conduct any ballot initiative that sought to legalize the use of a controlled substance, including, of course, marijuana.

The billing entries submitted by plaintiffs' counsel indicate that on the very day the Barr Amendment was enacted, lawyers for the American Civil Liberties Union ("ACLU") began to formulate a legal challenge to the Amendment that they would ultimately bring on behalf of five registered voters on October 30, 1998. Plaintiffs named the Board as the only defendant.

Because the ballots had already been printed when the Barr amendment was enacted, District of Columbia voters voted on the initiative on election day, November 3, 1998. On that day the Board issued a press release explaining that it would not release the voting results of the initiative for fear of violating the Barr Amendment. Plaintiffs' Motion for Attorney's Fees and Expenses, Exhibit E.

On November 6, 1998, however, the Board filed a Motion of Defendant for Expedited Review and Declaratory Judgment, in which the Board asked this Court to declare that the Barr Amendment violated the "First Amendment rights of the voters of the District of Columbia." Id. at 1. The Board sought an order

authorizing it to announce and certify the results of the vote on the marijuana initiative. On November 9, 1998, the United States asked that the application plaintiffs had filed for a temporary restraining order be denied. On November 23, 1998, the United States intervened to defend the Barr Amendment.

Ultimately, Judge Roberts concluded that the Barr Amendment did not preclude counting, announcing, and certifying the results of the marijuana initiative. In reaching that conclusion, Judge Roberts invoked the principle that a construction of a statute which avoids the resolution of constitutional issues is preferred and that, if the Barr Amendment precluded the counting, announcing, and certifying the results of the marijuana initiative, it would be of dubious constitutionality. Turner, 77 F. Supp. 2d at 34.

By my order of July 24, 2001, I denied plaintiffs' fee petition on the grounds that plaintiffs had failed to meet the jurisdictional deadline EAJA imposes. Initially, plaintiffs took the position that the Board should be liable for "any amount of fees awarded under § 1988 that exceeds the amount awarded under EAJA." Order of July 24, 2001, at 15, quoting Plaintiffs' Motion for Attorney's Fees and Expenses at 23-24. In fairness to plaintiffs, I permitted them to discuss the validity of any award against the Board in light of my determination that plaintiffs could not recover any fees against the United States. Plaintiffs have responded by insisting that the Board is obliged to pay all the legal fees incurred from the commencement of the case until Judge Roberts' opinion plus the time spent litigating the validity of their petition for fees. Plaintiffs take this position even though plaintiffs and the Board sought a declaration that the Barr Amendment was unconstitutional, in the face of opposition from the United States.

INTRODUCTION

Section 1988 empowers the district court, " in its discretion," to provide "[a] reasonable attorney's fee as part of the cost" to the prevailing party in any action brought under 42 U.S.C. § 1983 42 U.S.C.A. § 1988 (b) (1994). "[The] fee applicant bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates." Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C.Cir.1995) (quoting Hensley v. Eckhart, 461 U.S. 424, 437 (1984)).

I must first determine that the predicate requirements for 42 U.S.C.A. § 1988 (1994) are met insofar as plaintiffs were prevailing parties and the Board's actions were taken under color of state law. I will then determine whether the Board may be held jointly and severally liable for all the fees plaintiffs incurred; whether, as the Board claims, exceptional circumstances preclude the award of any attorney fees against it; and, if not, what portion of the fees should be paid by the Board.

Prevailing Party

One of the requirements for an award under § 1988 is that the applicant be a "prevailing party." District of Columbia v. Patterson, 667 A.2d 1338 (D.C. 1995). Plaintiff no doubt meets this definition:

> To qualify as a prevailing party for attorneys' fees purposes, a plaintiff must show that the final result represents in a real sense, a disposition that furthers their interest. In applying this inquiry. The court must focus on the precise

> factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or relief from a burden.

Grano v. Barry, 783 F.2d 1104, 1108 (D.C. Cir. 1986)(citations omitted).

Plaintiff here sought to enjoin the Board from withholding the results of the November 3, 1998, ballot initiative, and that is precisely what they achieved through Judge Robert's September 17th, 1999 Order. The Board's argument that plaintiffs were not a prevailing party because the Board was never found to be at fault is inapposite because it confounds two distinct concepts, i.e., "prevailing party" and whether "good faith" is ever a special circumstance justifying denial of a fee award under § 1988. See infra at 7. A party prevails irrespective of whether his opponent acted with fault or in bad faith.

Section 1983 Liability

Defendant argues that an award of attorneys' fees is not in order here because liability for 4 fees under § 1988 is predicated on liability under 42 U.S.C.A. § 1983 (1994), for the violation of constitutional or federal statutory rights under the color of a "statute of any State... or the District of Columbia." Defendant reasons that, because it did not act under color of a statute of the District or Columbia, but rather of federal congressional legislation, it cannot be held liable under § 1983. This argument ignores that § 1983 itself acknowledges that "[f]or the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." Pub. L. No. 96-170 § 1, 93 Stat. 1284 (1979).

District Properties Associates v. District of Columbia, 743 F.2d 21, 27 (D.C. Cir. 1984), applied this provision in treating a Congressional statute establishing the District of Columbia Administrative Procedure Act as a statute of the District of Columbia. In another case, when the Supreme Court held that a clause of a statute Congress enacted regulating activity near embassies located in the District of Columbia was unconstitutional, this Court, per Judge Gasch, imposed liability for attorneys' fees upon the District of Columbia pursuant to 42 U.S.C.A. § 1988(1994), rejecting the District's claim that it "did not benefit from the statute." Boos v. Barry, 704 F. Supp. 5, 9 (D.D.C. 1989). Likewise, in this case, the Barr Amendment, although passed by Congress, applies only to the District of Columbia and must be treated as a statute of the District of Columbia for the purposes of §§ 1983 and 1988.

Joint and Several Liability

We therefore reach the ironic result of holding the District of Columbia accountable for a Congressional enactment that the District attacked as unconstitutional. Indeed, plaintiffs demand that the Board be jointly and severally liable for all the fees incurred in this case, from the beginning to the end. The Board understandably rejects that claim and argues that this case is one where special circumstances make the award of any fees unjust.

Plaintiffs cannot impose joint and several liability upon the District and the United States. A fundamental analogy to well-established tort law is instructive. It is certainly true that multiple defendants found liable for a single injury are deemed to be joint torfeasors and any compensatory damages for that single injury must be awarded jointly and severally against them. Faison v.

Nationwide Morta. Corp., 839 F.2d 680, 686 (D.C. Cir. 1987). It is equally true, however, that:

> If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

Restatement (Second) of Torts § 881 (1979). In this case, it must be said either that the District and the United States caused plaintiffs two distinct harms, i.e., the fees incurred prior to November 7, and those incurred after November 6, or that the District and the United States caused plaintiffs a single harm, plaintiffs' incurring legal fees, but there is a reasonable basis for dividing responsibility between them. In either instance, it is irrational and unfair to force the District to pay fees plaintiffs incurred after November 6, 2001, when the District and plaintiffs jointly sought the same relief and all the work plaintiffs' counsel did was directed against the arguments being made by the United States and the United States alone.

Special Circumstances

A prevailing party in a § 1983 action is generally entitled to attorneys' fees unless special circumstances would render the award unjust. Hensley, 461 U.S. at 429; Grano, 783 F.2d at 111 I (applying the same rule used in Commissioners Court v. United States, 683 F.2d 435, 438 (D.C. Cir. 1982)). Special circumstances, however, have been held to be quite rare and the exception is narrowly construed. Hatfield v. Hayes, 877 F.2d 717, 719 (8'h Cir.

1989). See 2 M. Schwartz & J. Kirklin, Section 1983 Statutory Attorney Fees § 3.13 (3d ed. 1997).

A commonly argued special circumstance is the defendant's good faith interpretation of a law that is ultimately held to be in violation of a federal right. Yet it is widely recognized that a defendant's good faith does not ordinarily constitute a "special circumstance" in determining the propriety of an attorney fee award. Williams v. Hanover Housing Authority, 113 F.3d 1294 (1'' Cir. 1997); Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981), cert. denied 455 U.S. 993 (1982); Love v. Maw, 620 F.2d 235 (10th Cir. 1980); Riddell v. Nat'l Democratic Party, 624 F.2d 539 (5th Cir. 1980).

Rejecting any claim of "good faith", plaintiffs argue that had the Board of Elections not construed the Barr Amendment so cautiously to preclude even the expenditure of the nominal amount of money it would have taken to tabulate and announce the results, this lawsuit would not have existed and plaintiffs would not have had to spend a penny in legal fees. That argument is buttressed by Judge Roberts' ultimate conclusion that the Board was wrong and that the Barr Amendment did not preclude the tabulation and announcement of the results. But, hindsight is always 20/20 and the worst that could be said of the Board is that it could have been more courageous in its interpretation. At the risk of another "but," one also has to note the utter dependence of the District of Columbia upon Congress for its budget. In light of this truly unique political arrangement, it is understandable to conclude that a cautious interpretation of the Barr Amendment was the better part of valor.

In any event, the proper focus in § 1983 cases is never on the defendants' "fault." It must never be forgotten that Congress enacted the fee shifting provision not to punish

defendants but to encourage lawyers to undertake litigation to vindicate the constitutional and statutory rights of those who could not otherwise afford to vindicate those rights.[1] While the Board did join plaintiffs in seeking a declaratory judgment that the Barr Amendment was unconstitutional, it did so only after being sued itself. There is absolutely no indication anywhere that the Board would have brought the lawsuit itself had it not been sued. It therefore must be said that, but for plaintiffs' bringing the lawsuit, the results of the initiative would have never been published. The fee shifting statute is designed to create an incentive for "private Attorney Generals" to bring meritorious lawsuits by vindicating the citizens' rights when the government may be incapacitated by political or budgetary considerations from bringing them. Boos, 704 F. Supp. at 9. Plaintiffs fall perfectly within that rubric and the interest in encouraging lawyers to undertake litigation compels the conclusion that this is not one of those rare cases where the award of fees is fundamentally unjust.

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[1] In fact, the above-cited cases, relied on by the defendants, illustrate that the award of attorneys' fees is "not designed merely to penalize defendants, but to encourage injured individuals to seek relief." Id. (citing Piggie Park, 390 U.S. at 402, 88 S.Ct. at 966). Thus, the question of fairness centers not on the defendant, but on the plaintiff. In the instant case the plaintiffs had no intervenors with similar interests and their interests were soundly vindicated as a portion of the statute was found unconstitutional. Moreover, if the District of Columbia were absolved of its obligation to pay the award, plaintiffs or their counsel would have to absorb the costs, which would be unjust to them and would deter future suits. See Piggie Park, 390 U.S. at 402, 88 S.Ct. at 966. Such a result would fly in the face of the premium that the Civil Rights Act places on litigants as private attorneys general vindicating individual rights. See Christiansburg Garment Co. v. EEOC, 434 U.S. at 420, 98 S.Ct. at 699; Miller v. Staats, 706 F.2d at 340; Boos, 704 F. Supp at 9.

Apportionment of Fees

It hardly follows that the Board is responsible for all of the fees claimed. Although joint and several liability is urged by plaintiffs, the court is obliged to "make every effort to achieve the most fair and sensible solution that is possible."[2] Grendel's Den Inc. v. Larkin, 749 F.2d 945, 960 (1st Cir.1984). Such an effort entails an apportionment of the fee liability.

There is no single formula for determining fee apportionment in a § 1988 action, and there is no relevant case law in this Circuit. In other Circuits, the various apportionment factors and methods employed have included: equal division among the defendants; the jury's assessed actual damages; holding a particular defendant who is solely or largely responsible for a single claim liable for fees related to that claim: relative culpability of the various defendants: and time spent by the plaintiff in preparing the case against each defendant. See generally Council for Periodical Distributors Associations v. Evans, 827 F.2d 1483, 1487 (11th Cir. 1987)(citations omitted). The last two of these factors are particularly appropriate in the instant case. In Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir., 1981), the court considered the time spent by plaintiffs' attorneys against a particular defendant. In that case, as here, plaintiff had sued a federal and a state defendant, and the federal

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[2] The fact that I denied an award of fee liability against the United States in my Order of July 23. 2001, is irrelevant to assessing liability against the D.C. Board. Plaintiffs failed to meet the strict deadlines for fee requests of EAJA, and the D.C. Board should not have to shoulder the costs of this mistake.

defendant had been exempted from liability for its share of attorney's fees. The District Court then apportioned 75% of the total fees to the state defendants, as they were the primary focus of the plaintiffs actions. The Circuit

Court subsequently affirmed this apportionment method, noting that at least 75% of plaintiffs counsel's preparation was directed towards the state defendants. Adams, 657 F.2d at 1125. This time-spent approach was also endorsed in Jenkins by Agyei v. State of Mo., 838 F.2d 260 (8th Cir. 1988) and Nash v. Chandler, 848 F.2d 567 (5th Cir. 1988).

Under the time-spent approach, plaintiffs should be able to recover no more than the fees and expenses incurred in opposing the D.C. Board. Thus, the fees related to the preparation of the complaint and all other work conducted prior to the Board's request for a declaratory judgment on November 6, 1998, when it effectively ceased opposing plaintiffs, are potentially recoverable under this approach. A review of plaintiffs' exhibits shows that Graham Boyd spent 69.9 hours on the matter up to and including November 6. Art Spitzer and Aaron O'Toole spent 13.6 hours and 24 hours, respectively, on pre-November 7 matters. Under the current edition of the matrix established in Laffev v. Northwest Airlines, Inc, 572 F.Supp. 354 (D.D.C. 1983), these figures amount to $25,590. Plaintiffs also seek to recover $569 in expenses incurred prior to November 8, bringing the total to $26,159.

But plaintiffs do not deserve all of this amount because the degree-of-culpability factor calls for a further reduction, as the Board was not primarily responsible for the violation. As the court in Evans wrote, "In cases such as the one now before the court, however, it may be

appropriate for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral or ministerial role in the wrong." Id., at 1487. See also Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir.1982). Here, it is clear that the United States was overwhelmingly responsible for initially suppressing the election results, because it was Congress that passed the legislation that restricted the Board's ability to certify the ballot results. Considering that Congress passed the Barr Amendment and, as I have explained, the Board's initial position as to the Barr amendment was cautious but not unreasonable, I will apportion the fees 90% to the United States and 10% to the Board. Thus, plaintiffs shall be awarded $2,616 in fees and expenses, which is 10% of their fees incurred as of November 6, 1998.

Fees on Fees Liability

In addition to the liability for fees incurred in litigating the plaintiffs claim, I must also determine the "fees on fees" liability for time spent preparing the fees petitions. The following chart indicates the hours spent by each of the plaintiffs' attorneys in preparing briefs on the fees motions. These figures are gleaned from plaintiffs' attorneys fees briefs. The fourth column, "Hours Spent on Unspecified Fees," represents fees work where the plaintiffs failed to distinguish between the § 1988 claims and the EAJA claims.

Attorney	Hours Spent on EAJA Fees	Hours Spent on 42 USC 1998 Fees	Hours Spent on Unspecified Fees	Rate	Total For Verified Hours on 1988	Total for Unspecified Hours
Graham Boyd			33.1	240		$8,109.50
Alicia Young	31	9	86.5	160	$1,440	$13,840
Arthur Spitzer		6.5	7.2	350	$2,275	$2,520
Aaron O'Tool			0	160		
					$3,715	$24,469.50

Plaintiffs seek a total of $33,140.50 for their services in litigating the fees motions. Right away, I shall strike $4,960 from this total, which represents Alicia Young's 31 hours researching EAJA issues, as plaintiffs cannot possibly expect to bill the District for arguments that were applicable only to the United States and that did not prevail in the first place. Thus, I am left to consider the remaining $28,184.50, which represents $3,715 of work that is attributed solely to the § 1988 claim and $24,469.50 of unspecified fees work that is not discretely attributed by plaintiffs to either the EAJA claim or the § 1988 claim.

The unspecified hours spent on the fees motions present the more difficult questions with regard to fees liability. One approach would be to deny all of this

portion of the fees application, on the grounds that plaintiff should have been more diligent in documenting the allocation of time between the two separate claims. But this seems unduly harsh, given that plaintiffs cannot reasonably be expected to have foreseen the ultimate importance of this allocation. The more sensible approach is to apportion the hours spent on the fees motions according to the respective length of each portion of plaintiffs' motions. This makes intuitive sense, as the relative length of the brief sections is a rough coefficient of the relative time spent researching and editing those sections.

The plaintiffs' April 10th, 2000, motion for fees runs 24 pages. Of these, seven pages cover the § 1988 fees claim, while over 11 pages address the EJEA claim.[3] In the plaintiffs' Reply in support of their fees motion, roughly nine pages cover their claim to fees under § 1988 (1994), while eight pages cover fees under the EAJA statute. In total, of the 35 combined substantive pages from the two briefs, 16, or 46%, address § 1988. Forty-six percent of $24,469.50 is 511,256. Adding in the 53,715 attributed solely to the § 1988 fees claim, I arrive at a total of $14,971 that can fairly be attributed to the § 1988 claim.

But this does not mean that plaintiffs deserve $14,971. Rather, I shall reduce this figure by 90%, because I found D.C. liable for only 10% of the fees incurred in the period prior to November 6, 1998. This reduction in the fees on fees award is entirely appropriate, given plaintiffs' lack of success in its motion for fees against D.C. See

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[3] The remaining pages comprise an introduction, a conclusion and a discussion of joint and several liability.

Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988). It would make little sense to fully reward plaintiffs for their efforts in arguing an essentially unsuccessful fee motion. Ten percent of $14,971 equals $1,497, and this amount shall be paid by the Board. to plaintiffs.

Added to the $2,616 in liability for the pre-November 7th substantive work, plaintiffs' total fees award shall be $4,113.

A separate order accompanies this Memorandum Opinion.

/s/ John M. Facciola
John M. Facciola
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2634

WAYNE TURNER, ET AL.
v.
D.C. BOARD OF ELECTIONS AND ETHICS

Before: FACCIOLA,
United States Magistrate Judge.
(Filed July 24, 2001)

MEMORANDUM OPINION AND ORDER

FACCIOLA, *United States Magistrate Judge.*

I. INTRODUCTION

This matter is before me for resolution of plaintiffs' Motion for Attorney's fees. Plaintiffs, five registered D.C. voters and a committee of such voters, filed this lawsuit on October 30, 1998, seeking to have the election results from Ballot Initiative 59 on medical marijuana announced and certified by the D.C. Board of Elections and Ethics ("the Board"). The Board had refused to release the results of Initiative 59 for fear such action would violate the Barr Amendment, an enactment which denies funding to any ballot initiative aimed at legalizing or reducing penalties for the possession, use, or distribution of controlled substances. Omnibus Consolidated Appropriations Bill of 1998, Pub. L. No. 105-277, 112 Stat. 2681-150 (1998). The United States

formally intervened in the lawsuit on November 30, 1998 to defend the constitutionality of the Amendment. By Order dated September 17, 1999, Judge Roberts granted plaintiffs' motion for summary judgment in part and ordered the Board to compute, certify and announce the results of the election. Neither the D.C. Board nor the United States appealed Judge Roberts' ruling. A more detailed history of this case is set forth in Judge Roberts' opinion of September 17, 1999. See Turner, et al. v. District of Columbia Bd. of Elections and Ethics, 77 F.Supp.2d 25 (D.D.C. 1999).

Plaintiffs filed their Motion for Attorneys' Fees on March 31, 2000, seeking fees against both the D.C. Board and the United States. With respect to their fee petition against the United States, plaintiffs seek fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C.A § 2412(d)(1)(A) (1998). The United States raised several procedural objections to plaintiffs' motion, including a timeliness defense.[1] In an Order dated March 21, 2001, I determined that based on the evidence before me, I could not resolve the timeliness issue, and ordered that an evidentiary hearing be held on the matter. Order of March 21, 2001, at 7-8. Accordingly, I denied plaintiffs' motion for fees without prejudice to refile. An evidentiary hearing was held on the timeliness issue on May 16, 2001.

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[1] The United States also objected to plaintiffs' fee petition on the grounds that 1) EAJA provided no basis for an award of fees in this case since this suit was not an action brought *against the United States,* see 28 U.S.C.A § 2412(d)(1)(A) (1998), and 2) pursuant to 28 U.S.C.A. § 2403(a) (1994), the federal government's liability was limited to court costs only. Order of March 21, 2001 at 3, 5. My Order of March 21, 2000 rejected these arguments, but left open the issue of the untimeliness of plaintiffs' fee petition against the United States.

Plaintiffs maintain that even assuming their EAJA petition was untimely, the doctrine of equitable tolling should apply here to excuse their late filing. For the reasons set forth below, the court holds that the circumstances of this case do not merit equitable tolling, and therefore plaintiffs' Motion for Attorneys' Fees against the United States will be denied.

BACKGROUND

Subsequent to Judge Roberts' grant of partial summary judgment for the plaintiffs, the parties jointly drafted and submitted a proposed order to Judge Roberts' which indicated that if defendants[2] did not appeal Judge Roberts' ruling, the parties would try to resolve the fees' issue within thirty days and thereafter report to the court. See Transcript of May 16, 2001 Hearing at 11, 12. That proposed order was memorialized by Judge Roberts on October 8, 1999, in an Order which reads:

> Upon consideration of plaintiffs' Motion for an Order Holding in Abeyance Proceedings Regarding Attorneys' Fees and Costs, and of the defendants' consent thereto . . . It is therefore, pursuant to F.R. Civ. P. 54, and Local Rule 215, hereby
>
> ORDERED, that the motion is granted and all issues relating to an award of attorneys' fees and costs shall be held in abeyance until further order of this Court; and it is further

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[2] For simplification purposes only, the Court uses this term to connote both the defendant, the D.C. Board and the intervenor, the United States.

> ORDERED that within 30 days of the deadline for the filing of an appeal in this case, if no appeal is filed . . . the parties shall confer with respect to issues of attorneys' fees and shall submit to the Court proposed order(s) regarding further proceedings on the fee issues.

Order of October 8, 1999 at 1, 2.

The expiration date for the federal government's ("government") appeal period was sixty days from the date of Judge Roberts' September 17, 1999 Order, or November 16, 1999. Fed. R. App. P.4(a)(1). Therefore, under the abeyance Order, if the government did not appeal Judge Roberts' summary judgment ruling, the parties had thirty days from November 16, 1999 to confer and thereafter submit a proposed order to the court. Id. at 2. Neither the D.C. Board nor the United States appealed the summary judgment ruling.

Pursuant to 28 U.S.C.A. § 2412(d)(1)(B) (1998), a party seeking an award of fees against the United States must file its application within 30 days of final judgment in the action. § 2412(d)(1)(B). Accordingly, under EAJA, plaintiffs had until December 16, 1999, or thirty days after the government's deadline for filing an appeal, to file their application for fees. Jeff Markowitz, the Department of Justice ("DOJ") attorney representing the government at that time, testified that he was not at all familiar with the EAJA filing deadline when he agreed to the October 8, 1999 Order with plaintiffs' attorney, Graham Boyd. T. at 70, ln. 10-11. Markowitz did not recall anyone from DOJ ever calling to his attention the EAJA filing deadline. Id., ln. 23. Plaintiffs' attorney Boyd did not state definitively whether he was aware of the 30-day EAJA filing deadline or not at the time

Judge Roberts' Order was issued.[3] T. at 22, ln. 9-20. Both Markowitz and Boyd have testified that neither attorney discussed any EAJA deadlines with one another at any time during their discussion of fees in this case. T. at 29, ln. 7-9; T. at 58, ln. 2.

On or about November 17, 1999, the day after the government's time to appeal had lapsed, Boyd contacted Markowitz to discuss fees. T. at 13, ln. 2-4. Markowitz told Boyd he could not discuss the fees' issue because he was leaving the DOJ shortly and felt it would be more productive for Boyd to take up the fees' issue with Markowitz's successor, who was yet unknown. Id., ln. 5-8. Markowitz indicated to Boyd that he would contact Boyd when he learned who would be taking over the Turner case for the government. T. at 14, ln. 13-14.

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[3] When asked whether Boyd recalled being aware of the EAJA filing deadline September 1999, when Judge Roberts' opinion was issued, Boyd responded:

> My recollection is that I was aware of the number of days that we had to file. Whether I was focusing on EAJA or the federal or local rules I'm not sure. What I can say is that I certainly was not aware of the case law that you [the United States] ended up citing in your brief regarding the construction of the deadline under EAJA.
>
> Q: Well, did you ever look at EAJA, specifically Section 2412(d)(1)(B), which provides that the petition had to be filed within 30 days of final judgement?
>
> Boyd: Again, I'm not– the 30-day figure I think is one I was aware of. I can't, thinking back to 1999, remember whether it was, you know, whether I was focusing on that or the other.

T. at 22, ln. 9-20.

Markowitz testified that sometime subsequent to December 7, 2000, he relayed to Boyd that attorney Mark Quinlivan would be Markowitz's successor.[4] T. at 14, ln. 21-24. In preparation for his departure on December 15, 1999, Markowitz prepared a transfer memo, dated December 1, 1999. T. at 55. Quinlivan recalls receiving the transfer memo within a day or two of December 1, 1999. T. at 76, ln. 11-17. According to Quinlivan, the transfer memo indicated that Boyd would be making a settlement offer regarding fees by December 16, 1999. T. at 77, ln. 20-25. Quinlivan testified that he did not hear from Boyd at anytime during December 1999. T. at 80, ln. 3.

Although the exact date is in dispute, Boyd and Quinlivan had their first conversation about this case after Boyd learned that Quinlivan would be taking over the case for the government. During their first conversation, which took place sometime in late December or the first part of January,[5] Quinlivan requested a formal settlement proposal from plaintiffs. T. at 15, 16. Quinlivan also testified that sometime in early January, Boyd referenced the parties' October 8, 1999 Order holding all fees' issues in abeyance

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[4] Markowitz recalls that he likely told Boyd about his successor on or before December 14, 1999, as Markowitz's last day at the DOJ was December 15, 1999. T. at 60, ln. 12-14. Boyd testified that his best recollection was that he learned of Quinlivan's entry into the case in late December 1999 or early January 2000, T. at 15, ln. 8-9, although, he testified, it could have been before December 20, 1999. T. at 35, ln. 19-20.

[5] Quinlivan recalls having his first conversation with Boyd sometime during the second week of January 2000, T. at 80, ln. 5-8. Boyd estimates that he learned who Markowitz's successor would be in late December or early January, though possibly before December 20, 1999. T. at 15, 35. According to Boyd, he called Quinlivan immediately after learning Quinlivan would be taking over the case for the government, and they talked within a day or two after that. T. at 15, ln. 12-16.

pending settlement efforts, and Quinlivan thereafter reviewed the consent order. T. at 87, ln. 20-25. Quinlivan testified that the first time he focused on the relationship between the October 8, 1999 Order and the EAJA deadline in the case was "sometime in January". T. at 87, ln. 18-25, T. at 88, ln. 1-5.

On January 21, 2000, the parties held a conference call in which plaintiffs' attorneys Graham Boyd and Arthur Spitzer, the government's attorney, Quinlivan, and a lawyer for the D.C. Board, discussed the possibility of settling the fee issue. T. at 17. The parties were unable to reach a resolution, and on February 4, 2000, they filed a report with Judge Roberts proposing a schedule for the fee petition. T. at 17-18. In drafting the proposed schedule for fees, attorney Quinlivan specifically asked for a notation which indicated that the government reserved its right to object to the timeliness of plaintiff's fee petition, although he did not specify on what grounds.[6] T. at 18, ln. 3-8; T. at 82, ln. 22-24.

Pursuant to the parties' proposed schedule, Judge Roberts issued an Order on February 14, 2000 directing plaintiffs to file their fees' motion on or before March 24, 2000. Order of February 14, 2000 at 1. After a subsequent

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[6] Quinlivan recalls raising the timeliness issue the first time he and Boyd spoke about the case, which Quinlivan estimates to be the second week in January 2000. T. at 80, ln. 16-18. He testified that he also spoke with Boyd about the timeliness issue during the January 21, 2000 conference. T. at 82. During that conference, according to Quinlivan, the government told Boyd that the fee petition was untimely. Id. at ln. 6-7. Quinlivan recalls Boyd opposing this, mentioning the parties' consent order of October 8, 1999, and stating the parties had agreed to hold the fees' issue in abeyance. Id. at ln. 7-10. Quinlivan also recalls in the same conversation mentioning to Boyd that this case may not be a suit "against the United States" under 28 U.S.C.A § 2412(d)(1)(A). T. at 82, ln. 12-14.

extension, plaintiffs filed their fee petition on March 31, 2000, approximately three and one-half months after the EAJA deadline had run.

ANALYSIS

The EAJA Filing Deadline

EAJA provides in relevant part:

> A party seeking an award of fees and other expenses shall, *within thirty days* of *final judgment in the action*, submit to the court an application for fees and other expenses which show that the party is a prevailing party and is eligible to receive an award under this subsection, and the amounts sought....

28 U.S.C.A. § 2412(d)(1)(B)(1998) (emphasis added).

Meeting this thirty-day EAJA deadline is a jurisdictional prerequisite to government liability under EAJA. See Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 225 (D.C. Cir. 1984); American Ass'n of Retired Persons v. EEOC, 873 F.2d 402, 407 (D.C. Cir. 1989); Bryan v. OPM, 165 F.3d 1315, 1321 (10th Cir. 1999) ("The thirty-day time limitation is jurisdictional in nature."); Bazalo v. West, 150 F.3d 1380, 1383 (Fed. Cir. 1998) ("We have unequivocally held that the thirty-day time limit for filing an EAJA application after final disposition of an adversary adjudication is a jurisdictional prerequisite to an award of attorney fees."); Yang v. Shalala, 22 F.3d 213, 215 n. 4 (9th Cir.); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1993); Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990) (same); Taylor v. United States, 749

F.2d 171, 174 (3d. Cir. 1984) (same); Allen v. Secretary of HHS, 781 F.2d 92, 93 (6th Cir. 1986). Because the thirty-day requirement is jurisdictional, neither the Courts nor the parties may waive it. See Howitt v. U.S. Department of Commerce, 897 F.2d 583, 583-84 (1st Cir. 1990) ("The circuit courts have unanimously agreed that the statute's 30-day time limit is *jurisdictional,* and therefore that neither they parties nor the courts may waive it.") (citing Adam Sommerrock Holzbau, Gmbh v. United States, 866 F.2d 427, 430 (Fed.Cir.1989); MacDonald Miller Co. v. NLRB, 856 F.2d 1423, 1425 (9th Cir.1988); J-I-J Construction Co. v. United States, 829 F.2d 26, 29 (Fed. Cir.1987); Western Newspaper Publishing Co. v. NLRB, 821 F.2d 459, 460 (7th Cir.1987); Sonicraft. Inc. v. NLRB, 814 F.2d 385, 386 (7th Cir.1987); cf. Long Island Radio Co. v. NLRB, 841 F.2d 474, 477 (2d Cir.1988) (30-day time limitation in 5 U.S.C. § 504(a)(2) for filing an initial application for attorney's fees for agency proceedings under EAJA is jurisdictional); Clifton v. Heckler, 755 F.2d 1138, 1144-45 (5th Cir.1985) (corresponding 30day time limitation in 28 U.S.C. § 2412(d)(1)(B) regarding initial EAJA application in civil actions is jurisdictional); Action on Smoking & Health v. CAB, 724 F.2d 211, 225 (D.C. Cir.1984) (same); Columbia Mfg. Corp. v. NLRB, 715 F.2d 1409, 1410 (9th Cir.1983) (per curiam) (5 U.S.C. § 504(a)(2) imposes jurisdictional limit); Monark Boat Co. v. NLRB, 708 F.2d 1322, 1326-27 (8th Cir.1983) (same)).

The claim of untimeliness is an affirmative defense and therefore the defendant bears the burden of pleading it. See Bowden v. U.S., 106 F.3d 433, 437 (D.C. Cir. 1997). However, once the defendant has met its burden, the plaintiff must then plead and prove facts which support equitable avoidance of the result of its untimely filing. Id. Defendant has met its burden of untimeliness. It is undisputed that final judgment in this case was entered on November 16, 1999.

Judge Robert's Order granting plaintiffs' motion for summary judgment was entered on September 17, 1999, see Turner, 77 F.Supp.2d at 35, and the United States' time for appeal lapsed on November 16, 1999. See Fed. R. App. P. 4(a)(1). Because the United States did not appeal Judge Roberts' Order, the date of final judgment for this matter was November 16, 1999. Accordingly, under 28 U.S.C.A. § 2412(d)(1)(B), the plaintiffs had until December 16, 1999 to file their fee petition.[7] Plaintiffs filed their motion for fees over three months later, on March 31, 2000.

Plaintiffs argue that principles of equitable tolling excuse their admittedly late filing. They rely upon the Supreme Court's ruling in Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 95 (1990), which held that equitable tolling is applicable to jurisdictional deadlines where Congress has already waived the federal government's sovereign immunity. Plaintiffs' Reply in Support of Plaintiff's Motion for Attorney's Fees and Expense ("Pl. Reply") at 12. Plaintiffs reason that because Congress waived sovereign

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[7] There is minor discrepancy between the parties' recitation of these relevant dates and the actual deadlines. In its opposition to plaintiffs' motion for fees, the United States indicates that Judge Roberts' Order granting plaintiffs' motion for summary judgment was entered on September 20, 1999. United States' Memorandum of Law in Opposition to Plaintiff' Motion for Attorneys' Fees and Expenses ("U.S. Memo Opp.") at 7. This date does not accord with the date of Judge Robert's published Opinion and Order, Turner v. D.C. Board of Elections and Ethics, 77 F.Supp.2d 25, nor with the docket sheet in this case, which both list September 17, 1999 as the date of judgment. Because the United States lists September 20, 1999 as the date of final judgment, they calculate that the time for appeal lapsed on November 19, 1999, and consequently, they claim plaintiffs' fee petition under EAJA was due on December 20, 1999. See U.S. Memo Opp. at 7. This Court will use the date that appears on Judge Roberts' Order and the court's docket sheet, September 17, 1999, as the starting point for its analysis.

immunity in enacting EAJA, EAJA's provisions are subject to the principles of equitable tolling. Id.

The issue before the Court in Irwin was whether the plaintiff's late-filing in a Title VII suit barred the court from hearing plaintiff's claim. Id. at 93. The Court held that it did not, and in so doing, stated that the case "affords us an opportunity to adopt a more general rule" regarding the applicability of equitable tolling in cases against the federal government. Id. at 95. The Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States...." id. at 95, 96, thereby specifically rejecting its past ad hoc approach to these cases, which had the "disadvantage of continuing unpredictability." Id. at 95.

Prior to Irwin, the D.C. Circuit, as discussed above, held that EAJA's filing deadline was jurisdictional and could not be waived. See, e.g., Action on Smoking, 724 F.2d at 225. After Irwin, both the Supreme Court and this Circuit have been silent as to whether EAJA is subject to equitable tolling.[8] The Court need not decide that issue today. Even assuming the § 2412(d)(1)(B) filing deadline is subject to equitable tolling, the circumstances of this case do not warrant its application.

Analysis of Equitable Tolling

Equitable tolling can apply in several circumstances. In Irwin, the Supreme Court noted that equitable tolling

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[8] Two post-Irwin cases in this Circuit give, at best, uncertain guidance. See Scott v. National Transportation Safety Board, 114 F.3d 305 (D.C. Cir. 1997) (EAJA deadline jurisdictional but no discussion of equitable tolling); Washington v. Washington Metropolitan Area Transit Authority, 160 F.3d 750 (D.C. Cir. 1998), *cert. denied,* 527 U.S. 1038 (1999) (applying equitable tolling to Title VII deadline).

applies in situations "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or where he has been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin at 96. This Circuit has indicated that equitable tolling is appropriate where

> "a claimant has received inadequate notice, ... where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, ... where the court has led the plaintiff to believe that she had done everything required of her, ... [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction."

Bull, S.A. v. Comer, 55 F.3d 678, 681 (D.C. Cir. 1995) (citing Mondy v. Secretary of the Army, 845 F.2d 1051, 1057 (D.C. Cir. 1988) (quoting Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (per curiam)). Further, a plaintiff's justifiable reliance on the advice of a governmental official may also excuse the plaintiff's failure to meet a filing deadline. See Bull, S.A. at 681 (quoting Jarrell v. United States Postal Service, 753 F.2d 1088, 1092 (D.C. Cir. 1985). Nonetheless, equitable tolling is only available in "extraordinary and carefully circumscribed instances," Smith-Haynie v. District of Columbia, 155 F.3d 575, 579-80 (D.C. Cir. 1998), and courts have been unwilling to apply it to "a garden variety claim of excusable neglect." Washington v. WMATA, 160 F.3d 750, 753 (quoting Irwin, 498 U.S. at 96).

Plaintiffs do not assert, nor could they make the claim, that they "actively pursued" their judicial remedies by "filing a defective pleading during the statutory period."

Plaintiffs made no filing in this case until March 31, 2000, approximately three and one-half months after the EAJA deadline had passed. Furthermore, plaintiffs have shown no affirmative wrongdoing on the part of defendants. Indeed, plaintiffs conceded at the evidentiary hearing on this matter that the defendants have engaged in no affirmative misconduct or trickery that would justify equitable tolling. T. at 92, ln. 12-19; T. at 29, ln. 23.

Instead, plaintiffs contend that equitable tolling should apply because the government induced plaintiffs to allow the EAJA deadline to pass when the government agreed to a consent order holding all fees issues in abeyance while the parties tried to settle the fees' claim, and then subsequently pursued an untimeliness defense after the EAJA deadline had passed. Pl. Reply at 12-13. Courts may excuse late filing when the plaintiff was misled by their adversary's actions about the running of the filing period, see Bowden v. United States, 106 F.3d 433, 438 (D.D.C. 1997), or induced by their adversary's misconduct into allowing the deadline to pass. Irwin at 96, fn.4 (citing Glus v. Brooklyn Eastern Terminal (adversary' misrepresentation caused plaintiff to allow filing deadline to lapse; Holmberg v. Armbrecht, 327 U.S. 392 (1946) (same)).

Plaintiffs here were not induced or misled by defendant's conduct. Both the pleadings before me and the testimony presented at the hearing indicate that the parties mutually agreed to hold all fees' issues in abeyance pending settlement discussion. The parties did so without ever discussing the EAJA deadline. T. at 29, ln. 7-9; T. at 58, ln. 2. Further, the government at no time represented to plaintiffs that the EAJA deadline would be waived. Indeed, government attorney Markowitz testified that he not even aware of the EAJA deadline. T. at 70, ln. 10-11. Given that the government's attorney was unaware of the EAJA

deadline when he agreed with plaintiffs' attorney to hold fees' issues in abeyance, and made no representations whatsoever as to EAJA, I cannot reach the conclusion that defendants somehow induced or lulled plaintiffs into missing the deadline.

Furthermore, while Markowitz's successor, Quinlivan, testified that he was familiar with EAJA and its filing deadlines, T. at 80, he also testified that he did not focus on the relationship between the parties' October 8, 1999 consent order and the applicable EAJA deadline until early January 2000. T. at 87, ln. 18-25. Had Quinlivan been simultaneously aware of the consent agreement and the approaching EAJA deadline, plaintiffs may have a case for misconduct or a misleading of plaintiffs into missing the deadline, because this would show that the government allowed the deadline to pass knowing that the parties agreed to hold all issues with respect to fees in abeyance while they tried to settle the matter. However, plaintiffs offered no evidence to refute Quinlivan's testimony, or to suggest that Quinlivan was aware of the consent agreement between the parties prior to the time the EAJA deadline passed. Therefore, on the evidence before me, I cannot agree with plaintiffs' assertion that the government misled plaintiffs into missing the EAJA deadline.

Plaintiffs also contend that equitable tolling is appropriate here because they reasonably relied on the advice of a government official. Plaintiff's Reply in Support of Their Renewed Motion for Attorneys' Fees and Expenses at 4. In support of this argument, plaintiffs cite to Jarrell v. United States Postal Service, 753 F2d 1088 (D.C. Cir. 1985), which held that a filing deadline may be excused where a *pro se* claimant failed to contact an EEO counselor in a timely manner because the claimant relied on the assurances of an EEO officer that the officer was attempting to have certain

information expunged from the claimant's records. Id. at 1092. Plaintiffs' case, however, is readily distinguishable.

Unlike the claimant in Jarrell, plaintiffs here were not proceeding *pro se*, but were instead represented in the fees' negotiations by a nationally-renowned legal organization, the ACLU. Significantly, plaintiffs were represented by the ACLU when plaintiffs and the government jointly agreed to hold all fees issues in abeyance. The ACLU continued to try to negotiate a settlement on behalf of the plaintiffs throughout the relevant period. In contrast with the claimant in Jarrell, the plaintiffs here, represented at all times by counsel, cannot claim their lateness in filing was justifiable. The ACLU has a distinguished history of engaging in the most significant civil rights and civil liberties litigation in American history. See www.aclu.org/library/Freedomls.Why.pdf. It routinely engages in litigation against the United States government, and its attorneys should have known, or made themselves aware, of the appropriate filing deadlines under EAJA, irrespective of any agreement entered into by the ACLU and the government attorneys. Cf. Battle v. Rubin, 121 F. Supp.2d 4, 9 (D.D.C. 2000). The Supreme Court has "generally been much less forgiving in receiving late filings where claimant failed to exercise due diligence in preserving his legal rights." Irwin, 498 U.S. at 96.

In sum, I conclude that the circumstances of this case do not warrant equitable tolling. I reach this result with some regret; disposition on the merits is always preferable to a procedural default. Nevertheless, if one construes Boyd's equivocal testimony, see n. 4 supra, in ACLU's favor, its best case is that its attorney (Boyd) and the government's attorney (Markowtiz) were mutually ignorant of a jurisdictional deadline when they agreed to postpone Judge Roberts's consideration of the a petition pending the parties'

attempt to negotiate fees. At the risk of patronizing them, one has to say that those lawyers ought to know that deadlines, inexorable and sometimes devastating to their clients' interests, are a litigating lawyer's life and she ignores them at her peril. To excuse the ACLU's failure to learn of the EAJA deadline because government's counsel was equally ignorant of it is unprecedented, unsanctioned by any legal authority, and a contortion of the history and purpose of the concept of "equitable tolling." Mutual ignorance of a deadline by the government and its opponent cannot invoke a principle designed to prevent government sharp dealing and to permit justified reliance on the statements of government officials which could lead a reasonable person to believe that a deadline is being waived or does not apply until another event occurs.

It must also not be forgotten that EAJA is a waiver of sovereign immunity which must be construed strictly in favor of the sovereign. In re Sealed Case, 2001 WL 739819 * 4 (D.C. Cir. July 3, 2001). To excuse the ACLU's failure to meet a jurisdictional deadline because its attorneys were as ignorant of it as the government is to violate that principle in the most obvious way. It would be hard to imagine a more generous construction of that waiver of sovereign immunity than to waive it because a lawyer was ignorant of it.

CONCLUSION

Accordingly, this court will deny plaintiffs' Renewed Motion for Attorneys' Fees as to the United States. An Order will be issued accompanying this Memorandum Opinion which will deny plaintiffs' motion for fees against the United States.

The ACLU also seeks fees against defendant D.C. Board of Elections. It is the ACLU's position that the United States and the D.C. Board share joint and several liability for

"expenses and for fees up to the amount compensable under EAJA". Plaintiffs' Motion for Attorneys' Fees and Expenses ("Pl. Mot.") at 23. As plaintiffs state: "Here, the shared liability should apply to plaintiffs' expenses and to the amount of fees awarded under EAJA. The D.C. defendants should be solely liable for any amount of fees awarded under § 1988 that exceeds the amount awarded under EAJA." Pl. Mot. at 23-24. Obviously, my determination today denying any award of fees against the United States may substantially impact plaintiffs' position on fees vis-a-vis the D.C. Board. Therefore, in fairness to the parties, I will grant the ACLU and the D.C. Board the opportunity to address the validity of any recovery of fees against the D.C. Board in light of my determination. Accordingly, I will permit the ACLU to file, within fourteen (14) days of the date of this Order, a statement which addresses whether, in light of the determination denying fees as to the United States, an award of fees against the D.C. Board is valid. The D.C. Board shall have fourteen (14) days thereafter to respond, and the ACLU seven (7) days thereafter to file a reply.

/s/ John M. Facciola
John M. Facciola
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2634

WAYNE TURNER, ET AL.
v.
D.C. BOARD OF ELECTIONS AND ETHICS

Before: FACCIOLA,
United States Magistrate Judge.
(Filed March 21, 2001)

MEMORANDUM OPINION AND ORDER

FACCIOLA, *United States Magistrate Judge.*

Plaintiffs seek attorneys fees against the District of Columbia Board of Elections and Ethics ("the Board") and the United States. Before I can resolve the merits of plaintiffs' fee petition, I must address several outstanding issues.

A. Award of Fees Against DC Board of Elections

Plaintiffs assert fees against the Board pursuant to 42 U.S.C.A. § 1988 (1998). Section 1988 reads in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681

> et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .

42 U.S.C.A. § 1988(b)(1998).

As the plain language of Section 1988 indicates, plaintiffs are only entitled to fees in an "action" specifically enumerated in Section 1988. While plaintiffs in their petition refer offhandedly to this case as a Section 1983 case,[1] I can find no indication, either in the pleadings in this case or in the opinion rendered by Judge Roberts, indicating that this matter was "... [an] action... to enforce a provision of section[s]... 1983." Plaintiffs' original and amended complaint state causes of action under the First and Fifth Amendments (see Plaintiffs' Amended Complaint at 7). Plaintiff's Motion for Summary Judgment challenges the Barr Amendment on First Amendment grounds. Neither the complaint nor the motion for summary judgment therefore specifically identify the cause of action as an action under one of the statutes enumerated in Section 1988.

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[1] Plaintiffs state: "When, in cases such as this one, plaintiffs obtain relief on civil rights claims *under 42 U.S.C. § 1983*, the court must award them attorneys' fees pursuant to 42 U.S.C. § 1988 unless special circumstances would render the award unjust." (See Pls.' Mtn. Fees at 5) (emphasis added).

I cannot reach the merits of plaintiffs' Section 1988 claim without first addressing the threshold issue of whether the case before me presents a cause of action under Section 1983, or any of the other statutes enumerated in Section 1988. I therefore will order that plaintiffs file a supplemental statement indicating whether the matter before me in fact states a cause of action under any of the statutes enumerated in Section 1988. The Board shall have an opportunity to respond to plaintiffs' statement. Only after parties have briefed this issue can I reach the merits of plaintiff's petition insofar as it seeks fees against the Board.

B. Award of Fees Against the United States

Plaintiffs also assert a claim of attorneys' fees against the United States pursuant to the Equal Access to Justice Act ("EAJA"), 42 U.S.C.A. § 2412(d)(1)(A) (1998). EAJA provides in relevant part:

> Except as otherwise provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

§ 2412(d)(1)(A).

The United States raises two jurisdictional hurdles to plaintiffs' claim. First, they argue that plaintiffs' fee petition is untimely and therefore the court lacks subject matter

jurisdiction over the petition. (United States' Opp. at 5-10). Second, they argue that because the United States was not named as a defendant in this case, but rather intervened to defend the constitutionality of the Barr Amendment, the plain language of § 2412(d)(1)(A) of EAJA and 28 U.S.C.A. § 2403(a)(1998), the statute authorizing intervention, provide no basis for an award of fees against the United States. I will first consider the United States' positional claim, and then address its Section 2403(a) and timing issues.

1. No Cause of Action Against the United States

The United States argues that Section 2412(d)(1)(A) provides for fees and other expenses incurred in a civil action "brought... *against the United States*" and this suit is not an action against the United States because the United States was never named as a defendant. (U.S. Opp. at 10-11) (emphasis added). Rather, the United States argues, it was merely an intervenor and therefore the plain language of EAJA provides no authority for an award of fees against the Untied States. Id.

Emphasizing its status as intervenor rather than defendant for the purposes of concluding that plaintiffs' action is not an action against the United States is hair-splitting. Fed. R. Civ. P. 24(c) requires a party desiring to intervene to file a pleading "setting forth the claim or defense for which intervention is sought." The rule obviously requires that the intervenor intervene as a party; a motion which seeks intervention solely to stay an action is insufficient. Further, the intervening party must file to intervene as a party plaintiff of defendant. Kamerman v. Steinberg, 681 F. Supp. 206,211 (S.D.N.Y. 1988). See also Williams & Humbert Ltd. v. W.& H. Trade Marks (Jersey) Ltd., 840 F.2d 72 , 75 (D.C. Cir. 1988) (intervening party

must tender legally sufficient claim or defense); Rhode Island Federation of Teachers, AFL-CIO v. Norberg, 630 F.2d 850, 854-55 (1st Cir. 1980).

Moreover, once intervention is permitted, the intervening plaintiff or defendant is a party to the lawsuit, bound by the judgment, and entitled to the same rights as the original parties. Alvarado v. J.C. Pennev Co., 997 F.2d 803, 805 (10th Cir. 1993). Thus, from the moment it intervened to the end of the lawsuit, the United States was a party defendant to this action just as if it had been originally sued. From the moment it intervened as of right and opposed the relief plaintiff sought, the action plaintiff brought was as "against the United States" as if plaintiff had originally sued the United States. To argue otherwise would ignore the reality that the United States entered this lawsuit as a party defendant and had that status from beginning to end. EAJA therefore expressly authorizes the fees plaintiffs seek.

Furthermore, EAJA was enacted to remove financial disincentives for persons "defending against unjustified governmental action" and therefore "deter the unreasonable exercise of Government authority." Ardestani v. I.N.S 502 U.S. 129, 138 (1991) (quoting Congressional Findings and Purposes, 94 Stat. 2325, note following 5 U.S.C. § 504; H.R.Rep. No. 96-1418, pp. 10, 12 (1980); S.Rep. No. 96-253, supra, at 5; Commissioner, INS v. Jean, 496 U.S. 154, 163, 110 S.Ct. 2316. 2321, 110 L.Ed.2d 134 (1990)). Drawing a distinction in the interpretation of EAJA between the United States as original defendant and as intervening defendant is to draw a distinction that defeats EAJA's purposes.

2. Scope of United States' Liability

The United States also argues that 28 U.S.C.A. § 2403(a)(1994) limits the government's liability to court costs only. Section 2403(a) provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to *all liabilities of a party as to court costs* to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality. (emphasis added)

The United States argues that the language of section 2403(a) necessarily excludes an award of attorneys' fees under EAJA because the principle of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another thing) controls here. (U.S. Opp. at 12). The United States reads the phrase "subject to all liabilities of a party *as to court costs*" in 2403(a) as limiting the government's liability here to court costs, and necessarily excluding the award of attorneys fees.

Even assuming that the phrase "court costs" can be read narrowly to exclude attorneys' fees, I cannot view

Section 2403(a) in a vacuum. Subsection (a) of Section 2403 was enacted when the law was initially passed, on June 25, 1948. 28 U.S.C. § 2403(a), ch. 646, 62 stat. 971 (1948). By contrast, the subsection of EAJA related to fees, subsection (d), was not enacted until 1980 by § 204(a) of Pub. L. 96-481, effective October 1, 1981. 28 U.S.C. § 2412 (Supp. IV 1980). A brief review of the timing of the relevant provisions shows that the pertinent portion of EAJA was enacted subsequent to the intervenor statute that the government suggests limits its liability to costs. At the time the intervenor statute was passed, therefore, Congress did not expressly provide for an award of attorneys' fees against the United States. However, in passing EAJA, Congress specifically authorized such a waiver of sovereign immunity.

It is an accepted principle of statutory interpretation that if two statutes relate to the same purpose or subject matter, they should be construed together. See United States v. Freeman, 44 U.S. 556, 564-65 (1845); United States v. Borden Co., 308 U.S. 188, 198 (1939). Further, when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective, absent express congressional intent to the contrary. Morton v. Mancari, 417 U.S. 535, 551 (1974). It is only where provisions in the two acts are "irreconcilable" that the later act constitutes an implied repeal of the earlier one. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982). While the United States is certainly not arguing that EAJA trumps Section 2403(a), the underlying principle of statutory construction at work is useful to the analysis here.

Section 2403(a) and 2412(d)(1)(A) are not "irreconcilable" and should be construed together. Both statutes relate to the same subject, i.e., the United States' liability in an action in which the United States is a party. In placing the two statutes in their historical context, a fair

reading of section 2412(d)(1)(A) is to view it as a supplement to Section 2403(a), expanding the United States' liability to included fees and expenses. As discussed above, if the purpose of EAJA is to deter unjustified government activity and encourage private challenges, a reading of Section 2403 as limiting governmental liability to court costs in certain situations undercuts EAJA's broad intent. Therefore, reading each statute side by side, and giving effect to the purpose of EAJA, I find that the intervenor statute presents no jurisdictional hurdle to plaintiff's petition for fees.

3. Timeliness of Plaintiffs Fee Petition

As for the United States first procedural argument, namely, that plaintiffs' fee petition is untimely, the court is unable to resolve the issue on the papers submitted because they present a dispute of material fact.

The United States argues that plaintiffs failed to file their fee application within the requisite thirty days mandated by EAJA.[2] (U.S. Opp. at 5) Plaintiffs assert equitable tolling, claiming the United States induced plaintiffs to allow the deadline to pass by "consenting to an extension... [and] prolonging settlement negotiations through repeated requests for delay while a new attorney was assigned to the case..." (Pl. Reply at 12). Plaintiffs state that the day after the expiration of the period for the federal government to file a notice of appeal, they contacted the Department of Justice attorney then assigned to the case who requested a deferral of fee discussions because he was leaving the Department. (Id.

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[2] "A party seeking an award of fees and other expenses shall, within 30 days of final judgment in the action, submit to the court an application for fees and other expenses..." § 2412(d)(1)(B).

at 13). According to plaintiffs, the United States continued to delay informing plaintiffs when the case would be assigned to a new attorney, and only "after inducing plaintiffs to allow the filing deadline to pass" did the United States name a new attorney and agree to settlement discussions. (Id.)

The specificity and timing of these events is unclear and undeveloped, and I cannot resolve this issue without further probing the factual context leading up to plaintiffs' filing their fee petition. Specifically, what events do plaintiffs allege, from the time of Judge Roberts' order staying the proceedings regarding fees to the time of plaintiffs' filing of its fee petition, support their claim of equitable tolling? While plaintiffs' declarations discuss the basis for their defense in some detail, I am uncertain, for example, when exactly plaintiffs learned of the identify of the new attorney. I am also unclear as to what evidence, if any, defendant claims refutes plaintiffs' charge of inducement. I will therefore hold an evidentiary hearing on this discrete issue. I expect the parties to present the testimony of all witnesses who have information bearing on these questions and any other questions related to the timeliness of the fee petition that the parties think pertinent.

This order is placing new obligations upon plaintiffs who may well be entitled to claim additional attorney fees for the prosecution of this portion of the case. The defendants are entitled to an opportunity to rebut any such showing. Additionally, my resolution of the issues may radically transform what fees I will permit.

I will therefore, in my discretion, **deny** plaintiffs' Motion for Attorneys Fees [#43] without prejudice to refile it once the hearing on timeliness is held and I once resolve, based on plaintiffs' further submission on the issue, whether

plaintiffs can seek recovery of any fees from the Board. It is further

ORDERED that plaintiffs shall file a supplemental statement 14 days from the date of this order indicating whether this case in fact states a cause of action under any of the statutes enumerate in 42 U.S.C. § 1988. The Board shall have 11 days thereafter to file its opposition. Plaintiffs' reply shall be due 5 days thereafter. It is further

ORDERED that plaintiff and the United States shall appear before me on May 16, 2001, at 9:30 am for an evidentiary hearing on the discrete issue of the timeliness of plaintiffs' fee petition against the United States.

SO ORDERED.

/s/ John M. Facciola
John M. Facciola
United States
Magistrate Judge

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USC § 1988 (2004)

§ 1988. Proceedings in Vindication of Civil Rights.

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against

Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 161. UNITED STATES AS PARTY GENERALLY

28 USC § 2412 (2004)

§ 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under

the terms of any statute which specifically provides for such an award.

(c) (1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at

which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall

be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $ 125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $ 2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $ 7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the

Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court [United States Court of Federal Claims] and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount. (3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 [26 USCS § 7430] applies (determined without regard to subsections (b) and (f) of such section [26 USCS § 7430(b), (f)]). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Supreme Court, U.S.
FILED
AUG 6 - 2004
OFFICE OF THE CLERK

(2)

No. 03-1647

In the Supreme Court of the United States

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Petitioner,

v.

WAYNE TURNER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION

ARTHUR B. SPITZER
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W., Suite 119
Washington, DC 20036
(202) 457-0800

GRAHAM A. BOYD
ACLU DRUG LAW REFORM PROJECT
101 Cooper Street
Santa Cruz, CA 95060
(831) 471-9000

Attorneys for Respondents

QUESTION PRESENTED

Whether the court of appeals correctly ruled that the District of Columbia was jointly and severally liable for the prevailing plaintiffs' attorneys' fees in this lawsuit challenging the constitutionality of a District of Columbia statute under 42 U.S.C. § 1983, where the District of Columbia enforced the challenged statute throughout the litigation and provided the relief sought in the complaint only after the court ruled, and where the intervenor-defendant (to whom the district court had allocated most of plaintiff's fees) did not litigate any separate issues and had no power to provide plaintiffs with any of the relief they sought?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

1. The Merits Litigation 2
2. Plaintiffs' Motion for Attorneys' Fees 5
   a. The Denial of Fees Against the United States 6
   b. The Magistrate Judge's Award of Minimal Fees Against the Board of Elections 7
   c. The District Court's Fee Ruling 9
   d. The D.C. Circuit's Ruling 11

REASONS FOR DENYING THE WRIT 14

I. The Decision Below Creates No Conflict Among the Circuits 16

II. The Decision Below is Correct 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211 (D.C. Cir. 1984) 6

American Ass'n of Retired Persons v. EEOC, 873 F.2d 402 (D.C. Cir. 1989) 6

Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources, 532 U.S. 598 (2001) 15

Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999), *aff'd,* 530 U.S. 914 (2000) 27

Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) 12, 20, 26, 28

Consumers Union of the United States, Inc. v. American Bar Ass'n, 505 F. Supp. 822 (1981), *rev'd,* 688 F.2d 218 (4th Cir. 1982), *cert. denied,* 462 U.S. 1137 (1983) 25

Corder v. Gates, 947 F.2d 374 (9th Cir. 1991) 19

Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483 (11th Cir. 1987) 22

Crosby v. Bowling, 683 F.2d 1068 (7th Cir. 1982) 26

Dean v. Gladney, 621 F.2d 1331 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981) 17

District Properties Associates v. District of Columbia, 743 F.2d 21 (D.C. Cir. 1984) 24

Firebird Society v. Members of Board of Fire Commissioners, 556 F.2d 642 (2d Cir. 1977) 22

Hensley v. Eckerhart, 461 U.S. 424 (1983) 1, 15, 23

Herbst v. Ryan, 90 F.3d 1300 (7th Cir. 1996) 20, 21

Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980) 26

Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979) 26

Jones v. Espy, 10 F.3d 690 (9th Cir. 1993) 18

Kentucky v. Graham, 473 U.S. 159 (1985) 13, 25

Knights of Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984) 22

Koster v. Perales, 903 F.2d 131 (2d Cir. 1990) 21

Little Rock School District v. Pulaski County Special School District, 787 F.2d 372 (8th Cir. 1986) 22

Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) 26

Sable Communications, Inc. v. Pacific Telephone & Telegraph Co., 890 F.2d 184 (9th Cir. 1989) 19

Scarborough v. Principi, 124 S. Ct. 1856 (2004) 7

Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981) 16, 17, 18, 19

Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980)..... 12, 25

Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782 (1989)..... 15, 26

Turner v. District of Columbia Board of Elections and Ethics, 77 F. Supp. 2d 25 (D.D.C. 1999) 4

Turner v. District of Columbia Board of Elections and Ethics, 170 F. Supp. 2d 1 (D.D.C. 2001) 7

Turner v. District of Columbia Board of Elections and Ethics, 183 F. Supp. 2d 22 (D.D.C. 2001) 6

Venuti v. Riordan, 702 F.2d 6 (1st Cir. 1983)..... 25

STATUTES AND RULES

28 U.S.C. § 636 9

28 U.S.C. § 2412 ..... 5, 6, 13

42 U.S.C. § 1983 ..... 1, 7, 14, 29

42 U.S.C. § 1988 ..... 5, 7, 8, 12, 13, 14, 27

District of Columbia Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998) 2

District of Columbia Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-199, Division C, Title III, § 423, 118 Stat. 139 (2004)..... 4

Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979) 24

H.R. Rep. No. 96-548 (1979) 24

Fed. R. Civ. P. 54 ..... 6, 9

Fed. R. Civ. P. 72 ..... 6, 9

D.D.C. Local Civil Rule 54.2 5

D.D.C. Local Rule 215(b) 5

STATEMENT OF THE CASE

It is undisputed that the respondents (plaintiffs below) achieved complete success on the merits of this Section 1983 litigation challenging the constitutionality of a statute of the District of Columbia.[1] The Court of Appeals for the D.C. Circuit held that they were, therefore, entitled to a fully compensatory award of attorneys' fees against the petitioner D.C. Board of Elections and Ethics. The Board was the only defendant plaintiffs had sued, the only defendant that had enforced the challenged statute, and the only defendant that had the power to grant the relief plaintiffs sought.

The Board asserts that the court of appeals erred in awarding plaintiffs a fully compensatory fee. The Board prefers the district court's decision, which "apportioned" most of plaintiffs' fees to the United States, which had intervened to defend the statute—even though the United States could not be made to pay attorneys' fees because its sovereign immunity overrode the consent that its own lawyers had given to an extension of time for plaintiffs to file their fee application.

Under the circumstances of this case, the court of appeals did not err in following this Court's teaching that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). Nor did the decision below create a conflict among the Circuits, for no Circuit has ever held that "apportionment" is a technique by which a fully successful plaintiff may be deprived of a fully compensatory fee.

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[1] The statute in question was enacted by Congress and was applicable exclusively to the District of Columbia. As a matter of law, "any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

1. The Merits Litigation

On September 17, 1998, the D.C. Board of Elections and Ethics certified that the D.C. Medical Marijuana Initiative had obtained sufficient signatures to be placed on the November 1998 general election ballot. If it became law, that measure would have permitted seriously ill individuals to obtain and use marijuana for medical purposes under the care of a licensed physician without violating the laws of the District of Columbia.[2]

On October 21, 1998, Congress passed and the President signed the fiscal 1999 District of Columbia Appropriations Act. Section 171 of that Act, known as the "Barr Amendment" after its House sponsor (Rep. Bob Barr, R-Georgia), provided that:

> None of the funds contained in this Act may be used to conduct any ballot initiative which seeks to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 802) or any tetrahydrocannabinols derivative.

Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998).

Although the Barr Amendment was intended to prevent the submission of the Medical Marijuana Initiative to the voters, the general election ballots had already been printed and the Board of Elections determined that it was too late to change them. On November 3, 1998, the citizens of the District of Columbia cast their ballots on the measure.

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[2] The text of the initiative is available at http://www.dcwatch.com/election/init001.htm.

However, when it came time to count the ballots and announce the results, the Board of Elections chose to enforce the Barr Amendment despite the opinion of its own lawyers that the Amendment was unconstitutional.[3] Accordingly, the votes were not counted and the results were not announced or certified, even though D.C. law required the Board to count the ballots and certify the election results.

Plaintiffs filed this lawsuit for the purpose of getting the votes counted and the results announced and certified. Their complaint sought declaratory and injunctive relief, and alleged (a) that the Barr Amendment, properly interpreted, did *not* prohibit the Board of Elections from performing its statutorily-mandated duty of counting the ballots and certifying the results, and (b) that if the Barr Amendment did prohibit the Board from performing its duty, then the Barr Amendment violated the First and Fifth Amendments to the Constitution. Three days after the election plaintiffs filed an application for a temporary restraining order and a motion for a preliminary injunction. That same day the Board of Elections filed a motion for declaratory judgment supporting plaintiffs' arguments that the Barr Amendment was unconstitutional. However, the Board did not join in plaintiffs' statutory construction argument.[4]

On November 23, the United States moved to intervene to defend the constitutionality of the Barr Amendment. After expedited briefing on cross-motions for summary judgment, the merits were argued on December 18 and taken under advisement. Nine months later the district court (Richard W. Roberts, J.) issued its decision. The court concluded, as plaintiffs had argued, that the Barr Amendment did not

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[3] *See* Motion of Defendant for Expedited Review and Declaratory Judgment, Record Doc. 2.

[4] *Id.*

preclude the Board from "counting, releasing and certifying the vote on Initiative 59," because the phrase "conduct any ballot initiative" referred "only to conducting election day affairs." *Turner v. District of Columbia Board of Elections and Ethics,* 77 F. Supp. 2d 25, 29 (D.D.C. 1999). In reaching that conclusion, the court relied heavily on the principle of constitutional avoidance, *id.,* opining that if the Barr Amendment did prohibit the ballots from being counted, "it would have violated plaintiffs' First Amendment rights." *Id.* at 35.

Pursuant to the district court's decision, the Board counted the ballots and announced the results, which showed that the initiative had passed by a landslide, winning 69% of the vote, with a majority in every single precinct.[5]

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[5] The election results are posted on the Board of Election's website at http://www.dcboee.org/information/elec_1998/ini59_98.htm. Despite its passage, however, the measure has not become effective because it has been blocked by a congressional "budget rider" that has been attached to every subsequent D.C. Appropriations Act. The rider currently in effect provides:

> (a) None of the funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 802) or any tetrahydrocannabinols derivative.
>
> (b) The Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, shall not take effect.

District of Columbia Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-199, Division C, Title III, § 423, 118 Stat. 139 (Jan. 23, 2004).

2. Plaintiffs' Motion for Attorney's Fees

Thirteen days after the district court's summary judgment ruling, plaintiffs filed a Consent Motion for an Order Holding in Abeyance Proceedings Regarding Attorneys' Fees and Costs, which was consented to by both the Board of Elections and the United States.[6] The motion noted that D.D.C. Local Rule 215(b)[7] "recognizes that it may be 'in the interest of justice [for] the fee issues, in whole or in part, [to] be held in abeyance pending the outcome of [any] appeal'" (brackets in original), and represented that "all parties agree that it is in the interest of justice and efficiency to hold those issues in abeyance until it is known whether or not the defendants will appeal from this Court's September 17 Judgment, and, if they do appeal, until after that appeal is adjudicated." The Court issued the requested order, which also instructed the parties to "confer with respect to issues of attorneys' fees and . . . submit to the Court proposed order(s) regarding further proceedings on fee issues" after any appeal of the merits was either adjudicated or foregone.[8]

Neither defendant appealed. The parties then attempted to settle plaintiffs' fee claims, but did not succeed. Accordingly, plaintiffs' detailed Motion for Attorneys' Fees and Expenses was filed on March 31, 2000.[9] It sought fees against the Board of Elections under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and fees against the United States under the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiffs argued that they were entitled to fees under both statutory standards, and fully documented the hours their lawyers had reasonably expended on the litigation and

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[6] Record Doc. 37.

[7] Now recodified as D.D.C. Local Civil Rule 54.2.

[8] Record Doc. 38.

[9] Record Doc. 43.

the lawyers' reasonable hourly rates and out-of-pocket expenses. Plaintiffs argued that the United States and the Board were jointly and severally liable for the fees, recognizing, however, that the liability of the United States was limited by the cap on hourly rates imposed by 28 U.S.C. § 2412(d)(2)(A).[10] Pursuant to Fed. R. Civ. P. 54(d)(2)(D) and 72(b), the fee motion was referred to Magistrate Judge John M. Facciola for proposed findings and recommendations.

a. The Denial of Fees Against the United States

Although the United States had expressly consented to plaintiffs' motion to hold fee proceedings in abeyance, it now asserted that plaintiffs' motion for fees had to be dismissed as untimely, on the ground that the Equal Access to Justice Act required a fee motion to be filed "within 30 days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and that this statutory deadline was jurisdictional and not subject to waiver by the United States or extension by court order.[11]

Plaintiffs argued that principles of equitable tolling applied, particularly since the United States had "prolonged the [fee] settlement consultations due to [its] reassignment of the attorney responsible for this case."[12] But the magistrate judge concluded that the United States' consent to an extension was ineffective and that equitable tolling did not apply. *Turner v. District of Columbia Board of Elections and*

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[10] Record Doc. 43 at 22-24.

[11] United States' Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 51, at 5-9 (citing *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211, 225 (D.C. Cir. 1984) and *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 407 (D.C. Cir. 1989)).

[12] Plaintiffs' Reply in Support of Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 56, at 11.

Ethics, 183 F. Supp. 2d 22 (D.D.C. 2001), Pet. App. 40a. In light of clear Circuit precedent, plaintiffs accepted that decision and did not file objections with the district court.[13]

b. The Magistrate Judge's Award of Minimal Fees Against the Board of Elections

Turning to plaintiffs' motion for fees against the Board, the magistrate judge found that plaintiffs were prevailing parties and that their claimed hours and hourly rates were reasonable. *Turner v. District of Columbia Board of Elections and Ethics,* 170 F. Supp. 2d 1 (D.D.C. 2001), Pet. App. 25a.

The Board of Elections did not dispute those findings. However, it opposed plaintiffs' fee request *in toto* on the ground that Congress, rather than the D.C. government, had enacted the Barr Amendment. Based on that fact, the Board argued that in enforcing the Barr Amendment it was not acting "under color of . . . State" law, as required by 42 U.S.C. § 1983 (and, thus, by § 1988), because "the offending conduct was pursuant to *federal* not state or local law."[14] In a supplemental filing, it asserted that it was not liable for fees because "[p]laintiff has failed to articulate any *fault* on the part of the Board other than that it complied with *federal* law."[15]

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[13] Ironically, this Court's recent decision in *Scarborough v. Principi,* 124 S. Ct. 1856 (May 3, 2004), holding that the EAJA filing deadline is "not properly typed 'jurisdictional,'" *id.* at 1865, overrules the D.C. Circuit cases relied upon by the United States and the Magistrate Judge in dismissing plaintiffs' EAJA fee motion.

[14] Defendant's Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 50, at 7 (emphasis added).

[15] Defendant's Response to Plaintiffs' Additional Statement in Support of their Renewed Motion for Attorneys' Fees and Expenses Against the District of Columbia, Record Doc. 68, at 2 (emphasis added).

The magistrate judge rejected the Board's arguments as a matter of law, observing that they "ignore[] that § 1983 itself acknowledges that '[f]or the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.'" Pet. App. 29a (quoting 42 U.S.C. § 1983). Thus, as a matter of law, the Barr Amendment was attributable to the District of Columbia just as if the D.C. Council had enacted it. *Id.*

The magistrate judge also rejected the Board's argument that its good faith or lack of "fault" would render a fee award unjust. He noted that such arguments had often been made, and as often rejected:

> [T]he proper focus in § 1983 cases is never on the defendants' "fault." It must never be forgotten that Congress enacted the fee shifting provision not to punish defendants but to encourage lawyers to undertake litigation to vindicate the constitutional and statutory rights of those who could not otherwise afford to vindicate those rights. . . . There is absolutely no indication anywhere that the Board would have brought the lawsuit itself had it not been sued. It therefore must be said that, but for plaintiffs' bringing the lawsuit, the results of the initiative would have never been published.

Pet. App. 32a-33a. Thus, the magistrate judge concluded that the Board was liable for fees and expenses under 42 U.S.C. § 1988. Pet. App. 33a ("this is not one of those rare cases where the award of fees is fundamentally unjust").

Nevertheless, he awarded plaintiffs only 3% of the fees they had requested and documented, on two grounds. First,

he reasoned that the Board's liability for fees should exclude all work performed by plaintiffs' counsel after November 6, 1998—just one week after their lawsuit was filed—because on that date the Board had filed a "request for a declaratory judgment" and "effectively ceased opposing plaintiffs." Pet. App. 35a. Second, he *sua sponte* invoked the doctrine of "apportionment," and apportioned even that first week's worth of fees 90% to the United States and 10% to the Board—although the United States had not yet even moved to intervene during that first week. Pet. App. 34a-36a. He reasoned that "the Board was not primarily responsible for the violation" because "it was Congress that passed the legislation." Pet. App. 35a, 36a. Thus, plaintiffs were to receive fees for only one-tenth of the work their lawyers performed during only the first week of this wholly successful litigation.

c. The District Court's Fee Ruling

Plaintiffs filed timely objections with the district court,[16] triggering a *de novo* determination of their fee motion pursuant to Fed. R. Civ. P. 54(d)(2)(D) and 72(b) and 28 U.S.C. § 636(b)(1). The Board did not file any objections to the magistrate judge's rulings, although Rule 72(b) gives any party an additional ten days to file cross-objections after being served with another party's objections.

The district court issued its decision in January 2003. Pet. App. 18a.[17] It noted that plaintiffs' status as prevailing parties was undisputed. Pet. App. 20a. Without discussing or even citing a single court decision or any other authority relating to the apportionment of fees, the district judge concluded that

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[16] Record Doc. 74.

[17] The date of this decision as printed on page 18a of the Petition Appendix is incorrect. The correct date is January 8, 2003.

"apportionment is appropriate in this case," *Id.* He then stated three reasons why plaintiffs' fees should be reduced. First, that "[plaintiffs'] ability to recover a fully compensatory fee . . . is impeded by their failure to have filed their request for fees from the United States in a timely manner." Pet. App. 20a.[18] Second, that "[t]he Board should not be required to pay fees incurred during litigation on the merits after it requested a ruling from the Court that the Barr Amendment was unconstitutional." *Id.* And third, that "[t]he United States in this case was solely responsible for enacting the challenged legislation." Pet. App. 21a. Without explaining how any of these factors related to the relevant caselaw—and without even recognizing that 42 U.S.C. § 1983 made the Barr Amendment a "statute of the District of Columbia"—he followed the magistrate judge's lead and completely denied fees for any work done by plaintiffs' counsel after the first week of litigation, *e.g.*, denying fees for all work on plaintiffs' motion for summary judgment and for the oral argument on that motion. Pet. App. 20a. He thus awarded plaintiffs approximately 18% of the fees they had requested and documented for the merits litigation.[19]

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[18] Petitioner states that "the district court on *de novo* review found that Turner could have received a fully compensatory fee had he timely filed a request for fees from the United Sates under the EAJA." Pet. at 7. That is false. There is no such finding, or statement, or suggestion, in the district court's decision. The only relevant sentence in the district court's opinion is the sentence quoted in the text above. As explained below (*post* at 13 n.21), a timely motion for fees under EAJA would not necessarily have resulted in a fee award because the statutory requirements for an EAJA fee award are significantly more demanding than the requirements under § 1988.

[19] The district court's final fee award (after granting plaintiffs' motion for reconsideration based on erroneous calculations, Record Doc. 87) consisted of $24,000 for the litigation on the merits, $36,929 for the fee litigation and $600 in expenses, for a total of $61,529. Record Doc. 91.

Plaintiffs timely appealed to the D.C. Circuit. The Board of Elections did not cross-appeal.

d. The D.C. Circuit's Ruling

Contrary to petitioner's characterization, the court of appeals' decision had nothing to do with the general question whether an award of attorneys' fees may be apportioned among the losing parties. There is no reason to believe that such apportionment would be improper in the D.C. Circuit, whether the fee award is fully compensatory or less than fully compensatory. To the contrary, the court noted that it "normally would defer to a thoughtful rationale of the district court so long as it achieved a result that was fair to the parties." Pet. App. 8a.

What the court of appeals held was simply that the plaintiffs here—as *concededly* prevailing parties who had achieved complete success on the merits of their case, Pet. App. 6a-7a—were entitled to a fully compensatory award of fees against the Board of Elections on the basis of "well-settled propositions of law." Pet. App. 11a. The court of appeals' decision made no new law. Rather, it rejected the magistrate judge's "novel application of a comparative fault theory based on tort law," Pet. App. 8a, that had been adopted without discussion by the district court (*see* Pet. App. 20a), and that was without support in the law of attorneys' fee awards.[20]

In an opinion by Circuit Judge Judith Rogers, joined by Chief Judge Douglas Ginsburg and Circuit Judge David Tatel, the court of appeals held:

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[20] Notably, the Board of Elections had never even asked the magistrate judge to apportion plaintiffs' fees. He did so *sua sponte*, and without providing the parties any opportunity to address the propriety of apportionment in briefs or argument.

(a) That, in accord with "[l]ongstanding precedents," the plaintiffs, who had achieved excellent results, "should normally receive a fully compensatory attorney's fee." Pet. App. 7a.

(b) That the fact that Congress, rather than the D.C. Council, enacted the Barr Amendment is irrelevant as a matter of law "because under 42 U.S.C. § 1983 the Amendment is treated as a District of Columbia law." Pet. App. 11a.

(c) That "because an award of attorney's fees under § 1988 'is not meant as a "punishment" for "bad" defendants . . . [but] is meant to compensate civil rights attorneys who bring civil rights cases and win them,' the fact that it was not the 'fault' of the Board of Elections that the Barr Amendment was enacted by Congress . . . is not a 'special circumstance' warranting denial of a fully compensatory fee." Pet. App. 11a (quoting *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982) (Breyer, J.)) (brackets in original).

(d) That the plaintiff-friendly arguments made in briefs filed by the Board of Elections' lawyers did not relieve the Board of liability for fees because the Board "continued to enforce the Barr Amendment throughout Turner's § 1983 litigation." Pet. App. 11a (citing, *inter alia, Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739 (1980)).

(e) That plaintiffs' failure to file a timely application for EAJA fees against the United States was irrelevant to the Board's liability, "because the Board's liability for § 1988 fees is not derivative of the United States'," and because "the immunity of one defendant does not reduce the liability of a

non-immune co-defendant." Pet. App. 11a (citing, *inter alia, Kentucky v. Graham*, 473 U.S. 159, 164-65 (1985)).[21]

(f) That the Board's belated attempt to argue that *it* was a "prevailing party" was not properly before the court as it had not been raised below, and was in any event without merit because the Board was the only party that could count the votes and certify the election results and it had refused to do so. Pet. App. 10a-11a.

(g) That plaintiffs' claims against the Board of Elections and the United States were "non-fractionable" (*i.e.*, they properly gave rise to joint and several liability for fees) because they were "centered on a common set of issues" and did "not [involve] a separate claim against the United States." Pet. App. 14a. As the court explained, even "if the United States had not intervened, Turner would have been required to litigate the merits of his § 1983 claim so long as the Board continued to enforce the Barr Amendment." *Id.*[22]

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[21] The court of appeals misapprehended the record when it said that plaintiffs originally "sought fees from the Board under 42 U.S.C. § 1988 for any amount exceeding the award under EAJA." Pet. App. 4a. Plaintiffs' fee motion reflects their awareness that obtaining fees under EAJA (requiring a finding "that the position of the United States was [not] substantially justified," 28 U.S.C. § 2412(d)(1)(A)) is much more difficult than obtaining fees under § 1988 (requiring only a finding that the plaintiff was a "prevailing party"), and that they therefore might not receive any fees under EAJA. Accordingly, they asked that "a full award should be made against each defendant at this stage because of the possibility that one or both awards may be reversed or reduced on appeal." Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc 43, at 24 n.9.

[22] As the court of appeals pointed out, its conclusion rested on a finding of fact by the magistrate judge that "[t]here is absolutely no indication anywhere that the Board would have brought the lawsuit itself had it not been sued. It therefore must be said that, but for plaintiffs' bringing the lawsuit, the results of the initiative would have never been published." Pet. App. 33a. The Board did not file an objection to that

Accordingly, the court of appeals "remand[ed] the case to the district court to enter a fully compensatory award." Pet. App. 16a.

The Board of Elections filed a timely petition for rehearing or rehearing *en banc*. The petition for rehearing was denied. No judge called for a vote on the petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

As the court of appeals recognized, the Board's liability for plaintiffs' reasonable attorneys' fees follows from an unambiguous federal statute and from settled principles of law that petitioner chooses to ignore.

First, petitioner ignores the fact that for the purposes of litigation under 42 U.S.C. § 1983, and thus for fee awards under 42 U.S.C. § 1988, Congress has unambiguously provided that:

> any Act of Congress applicable exclusively to the District of Columbia *shall be considered to be a statute of the District of Columbia.*

42 U.S.C. § 1983 (emphasis added). Thus the District's plea that it was not responsible for the Barr Amendment may be true as a matter of fact but is false as a matter of law. The District is responsible for the Barr Amendment just as fully as if that statute had been enacted by the D.C. Council and signed by the Mayor.

Second, petitioner ignores the fact that it was the only party that violated plaintiffs' rights—by refusing to count

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finding of fact with the district court, did not dispute it before the court of appeals, and does not question it here.

their ballots—and the only party that could have provided the relief sought in the complaint—by counting them. Only the petitioner, and not the United States, was subject to a court-ordered "'material alteration of the legal relationship of the parties,'" *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 U.S. 598, 604 (2001) (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792-93 (1989)). Thus, the Board was the responsible party not only as a matter of law but as a matter of fact.

Third, petitioner ignores the fact that "the most critical factor" in evaluating the reasonableness of a fee award "is the degree of success obtained" by the party seeking fees. *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983). On the merits of this case, plaintiffs achieved complete success, and "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435. Petitioner points to no authority supporting an award of less than a fully compensatory fee in a case where, as here, a plaintiff was entirely successful in obtaining, through a final, unappealed judgment on the merits, the relief sought in his lawsuit.

The decision below recognized these facts and followed these authorities. It broke no new ground. It does not conflict with any decision of this Court or with the law of any other Circuit. Moreover, the factual and procedural circumstances of this case are highly idiosyncratic and unlikely ever to recur. Nothing about this case makes it appropriate for review.

I. The Decision Below Creates No Conflict Among the Circuits.

Petitioner's attempt to manufacture a circuit split begins with a mischaracterization of the decision below. According to petitioner, the D.C. Circuit "ruled, as a matter of law, that district courts do not have discretion to apportion fee responsibility when apportionment would result in less than a fully compensatory fee award for a prevailing plaintiff." Pet. 8. But the ruling was far more qualified than that.

An accurate statement of the court of appeals' ruling is that district courts do not have discretion to apportion fees when (a) the plaintiff "ha[s] achieved excellent results in civil rights litigation" and therefore "should normally receive a fully compensatory attorney's fee," Pet. App. 7a; (b) the plaintiff's claims against multiple defendants were not "fractionable," having "centered on a set of common issues against two or more jointly responsible defendants," Pet. App. 12a (internal quotation marks omitted); and (c) apportioning part of the fee award to a party "who cannot be made to pay" would be inconsistent "with the court's duty to ensure that a successful § 1983 plaintiff is awarded a fully compensatory fee." Pet. App. 13a.

No decision cited by petitioner, and no decision of which we are aware, conflicts with the decision below. Petitioner points to ten federal cases that, it says, conflict with the D.C. Circuit's ruling. We show below that none of them does.

Petitioner's lead case is *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981). As the court below recognized, Pet. App. 14a, that case is not remotely similar, for it involved *separate claims* successfully brought against the federal and state defendants. The successful claim against the federal defendants was that they had improperly approved

the state's selection of a particular corridor for a proposed highway. 657 F.2d at 1120. The successful claim against the state defendants was that they had improperly selected that corridor without "afford[ing] full opportunity for effective public participation . . . before submission to the Federal Highway Administration for approval." *Id.* at 1122 (internal quotation marks omitted). Thus, the time spent litigating the two claims was properly segregated for purposes of awarding fees. In affirming the district court's 75%-25% apportionment, the court of appeals went out of its way to explain that "[t]his is *not* a case of reducing fees by 25%, but rather is a case where plaintiffs are only entitled to fees for their action as against the state defendants. Since plaintiffs are not entitled to fees for their suit against the federal defendants, they cannot recover them from the state defendants." *Id.* at 1125 (emphasis added).[23]

Plaintiffs did not dispute below, and do not dispute here, that in cases involving separate claims against separate defendants, fees may be apportioned so that each defendant bears the cost of its own wrongdoing. *See, e.g., Dean v. Gladney,* 621 F.2d 1331, 1339-40 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981) (apportioning fees where discrete injuries were caused by different defendants). *Adams*

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[23] The Board asserts here, as it did below, that *Adams* did not involve separate claims because the plaintiffs in that case "'prevailed on' only 'their eighth claim'" against both the state and federal defendants. Pet. 11 n.2. The court of appeals rejected the Board's analysis of *Adams*, for the good reason that the "eighth claim" included *both* an allegation that the state defendants improperly held a public hearing on the route of the proposed highway after already having made up their minds about the route, *and* the *separate* allegation that the federal defendants improperly approved the route that had been selected after that sham process. *See* 657 F.2d at 1120-21. Moreover, in apportioning fees, the *Adams* court did not consider only the work done on the successful "eighth claim," but the total time plaintiffs' counsel spent litigating their separate claims against each defendant. *See id.* at 1125-26.

is simply an example of that situation, and, as such, it has no relevance here, where both defendants responded to the *same* claims.[24]

Petitioner next cites *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993). That case also involved fee claims against a state defendant under § 1988 and against the United States under EAJA, but as plaintiffs had achieved only a "partial victory," *id.* at 691, fully compensatory fees were not in the offing. The district court apportioned the partial fees that it did award on a 50-50 basis, and because the federal defendant's EAJA liability was capped at an hourly rate below market rates, plaintiffs did not collect as large an award as they would have if the fees had been unapportioned. However, the 9th Circuit carefully explained that, as in *Adams* (which it followed, *see* 10 F.3d at 692), "this is not a case in which the plaintiffs' 'full' award has been reduced; rather, it is one in which one defendant is fully liable for the attorney fees expended *against it* and the other is not." *Id.* (emphasis added). Specifically addressing the argument that *Jones* involved common claims against the state and federal defendants—an argument relied upon by petitioner here, Pet. 11 n.2—the *Jones* court responded:

> The plaintiffs also argue that the [district] court's factual characterization was incorrect in that the same amount of time would have been expended even if only one defendant were involved. Clearly, this is a question of fact that was resolved adversely to the plaintiffs, and we are presented with no information demonstrating this finding was clearly erroneous.

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[24] As noted earlier, plaintiffs sued only the Board of Elections. The United States subsequently intervened to defend against the same claims. No separate or additional claim was ever asserted against the United States.

10 F.3d at 692 n.3. Thus, petitioner's effort to show a conflict again runs aground on a dispositive factual finding that is directly at odds with petitioner's theory and with the undisputed facts of this case.

In *Sable Communications, Inc. v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184 (9th Cir. 1989), the court reversed a holding that General Telephone, a late intervenor, should be jointly liable for *all* of plaintiff's fees, including the large portion that had been incurred before General Telephone even entered the case. *Id.* at 194. The court explained that under those circumstances, a "[f]ailure to apportion fees fairly between the defendant and the intervenor would discourage intervention in civil rights cases, a result to be avoided." *Id. Sable* also noted that "'a fair result for [all] parties'" required that the defendant whose *conduct* was the focus of the litigation bear the major responsibility for the fees. *Id.* (quoting *Adams,* 657 F.2d at 1125). Thus, *Sable* is not at all consistent with the district court's allocation decision in this case, because here the district court allocated the bulk of the fees not against the original defendant, whose *conduct* (refusal to count the ballots) required the litigation, but against the intervenor United States—including fees incurred before the United States even entered the litigation, which was precisely the result that the *Sable* court found *improper.* Additionally, the apportionment in *Sable* did not have the effect of depriving the successful plaintiff of his fully compensatory fee.[25]

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[25] Petitioner cites a fourth Ninth Circuit case, *Corder v. Gates*, 947 F.2d 374 (9th Cir. 1991), for the proposition that "a district court should be given the discretion to prescribe apportionment 'when the time expended by the plaintiff in pursuing each defendant was grossly unequal.'" Pet. 15 (quoting *Corder* at 383). Neither we nor the D.C. Circuit have any quarrel with that proposition, unless such an apportionment is used to deprive a fully successful plaintiff of a fully compensatory fee for his attorney's work on common claims. The

Petitioner also relies on *Herbst v. Ryan*, 90 F.3d 1300 (7th Cir. 1996), which involved a successful challenge to an Illinois abortion statute. The defendants were two state officials and the state's 102 State's Attorneys. None of the State's Attorneys had ever enforced the challenged statute, *id.* at 1303, but had they done so they "would have been acting as *state* agents." *Id.* at 1302 (emphasis added). Yet had they been required to pay plaintiffs' attorneys' fees, those payments would have come out of their respective *county* treasuries. *Id.* at 1303 n.6. Under the circumstances, the Seventh Circuit affirmed the district court's decision to apportion 100% of the fee liability to the state, given that the entire litigation "was a defense of a state policy by state officers on behalf of the state." *Id.* at 1306.

Nothing in the decision below would preclude that same sensible result under the same circumstances, for the plaintiffs in *Herbst* received a fully compensatory fee. *See id.* at 1306 n.13. The D.C. Circuit did not say that considerations of comparative fault, responsibility or fairness could *never* be considered in allocating fees; it said only that "Section 1988 does not permit a court to inquire into defendants' comparative fault *where to do so obstructs Congress' purpose of compensating successful private attorneys general.*" Pet. App. 13a (emphasis added) (citing *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982) (Breyer, J.)). The Seventh Circuit in *Herbst* made clear that it agrees with the D.C. Circuit in that regard, explaining that "[i]t is frequently appropriate to hold all defendants jointly and severally liable for attorneys' fees," 90 F.3d at 1305, and that in considering any allocation of fees, a district court "ought to consider the broad remedial purposes of the

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holding in *Corder* is entirely consistent with the D.C. Circuit's decision here, for *Carder* affirmed the district court's decision to hold multiple defendants *jointly and severally liable* for the plaintiffs' fees. 947 F.2d at 383.

Civil Rights Act and the role that section 1988 plays in effectuating these goals." *Id.* at 1304. In particular, the *Herbst* court emphasized, courts should bear in mind that "the *overriding* goal of section 1988 is to reimburse, with a reasonable attorneys' fee, those private attorneys general who invoke and thereby invigorate federal constitutional and statutory rights." *Id.* (internal quotation marks and citations omitted) (emphasis added).

Indeed, the court in *Herbst* strongly hinted that it would follow the same course as the D.C. Circuit in circumstances like those presented here. Responding to a suggestion that the plaintiffs might face difficulties in collecting their fees from the state, the court noted with approval "that a number of courts have upheld the imposition of joint and several liability for a fee award where there existed a question as to whether the fee would be collectible from one of the defendants." *Id.* at 1306 n13.

Petitioner's next case is *Koster v. Perales*, 903 F.2d 131 (2d Cir. 1990). The facts and holdings of *Koster* do not help petitioner. The Second Circuit there affirmed an award of fees *jointly and severally* against multiple defendants, holding that enforcement agencies are liable for fees even when they are enforcing policies that are not of their own making, *id.* at 137, and that "joint and several liability is appropriate where the action or inaction of several defendants produces a single indivisible injury." *Id.* at 140. Those holdings are fully congruent with the ruling of the D.C. Circuit here, where the enactment and enforcement of the Barr Amendment produced a single indivisible injury to the plaintiffs.[26]

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[26] From the same Circuit, petitioner also cites *Firebird Society v. Members of Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), where defendants were held not liable for a small portion of the

Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483 (11th Cir. 1987) is to the same effect. Petitioner correctly identifies the relevant passage from *Evans:*

> In cases where two or more defendants actively participated in a constitutional violation, it will frequently be appropriate to hold all defendants jointly and severally liable for the attorney's fees. In [other] cases . . . however, it may be appropriate for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral or ministerial role in the wrong.

Id. at 1487 (quoted at Pet. 14-15). This analysis can give petitioner no comfort here, for the D.C. Board of Elections was the defendant that directly and actively violated plaintiffs' rights, by refusing to count plaintiffs' ballots. Its role cannot fairly be described as "passive."

Finally, petitioner string-cites *Little Rock School Dist. v. Pulaski County Special School Dist.*, 787 F.2d 372 (8th Cir. 1986) and *Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 735 F.2d 895 (5th Cir. 1984). Pet. 15. If the two-paragraph *per curiam* order in *Little Rock* stands for anything, it is only that fees can sometimes properly be

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prevailing plaintiffs' fee that was incurred in opposing intervention by a third party who wished to set aside a consent decree, an intervention that the defendants also opposed. This case would be analogous to *Firebird* if the D.C. Board of Elections had agreed to count and certify the election results and the United States had then sought to intervene to enjoin that settlement. Of course those facts did not occur. To the contrary, the Board of Elections' action in refusing to count the ballots meant that the Board was aligned, *in fact,* with the United States. As the court of appeals observed, "Turner incurred and continued to incur attorney's fees and expenses because the Board refused to certify the election results." Pet. App. 10a.

allocated among defendants. *Baton Rouge* upholds an allocation of 90% of fees against the United States in a case where the federal government was the primary instigator of a conspiracy to violate the plaintiff's constitutional rights. But the court makes clear that fees could have been assessed jointly and severally: "Where, as here, the issues before the court involved a 'common core of facts' and 'related legal theories,' it may be 'difficult to divide hours spent on a claim by claim basis." 735 F.2d at 901 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983)). Neither case is at odds with the decision below.

In sum, petitioner's cases stand for the unsurprising proposition that an apportionment of fees is sometimes required, is sometimes permissible, and is sometimes improper, and that district courts have discretion in allocating fees but may not abuse that discretion. Nothing in the decision below suggests that the law is otherwise in the District of Columbia Circuit. None of petitioner's cases holds that apportionment is required where it would deprive a fully successful plaintiff of a fully compensatory fee. None holds that a defendant who enforces a challenged law is not liable for a fully compensatory fee. Nothing in petitioner's cases suggests that any other Circuit would have exempted the D.C. Board of Elections from joint and several liability for plaintiffs' reasonable attorneys' fees under the facts of this case.

II. The Decision Below is Correct.

1. As the court of appeals recognized, there is nothing novel about this case except the novel theory fashioned by the magistrate judge to avoid imposing liability upon the District of Columbia. While plaintiffs share the D.C. government's frustration at congressional interference in

local matters (as exemplified by the Barr Amendment), the court of appeals factually pointed out that

> [t]he unique relationship between Congress and the District of Columbia under the Constitution simply means that there will be occasions when the District of Columbia government must pay attorney's fees for successful § 1983 lawsuits challenging laws that the District Government did not enact, for any Act of Congress that is solely applicable to the District of Columbia is a law of the District of Columbia for § 1983 purposes.

Pet. App. 13a. In other words, when enacting laws applicable only to the District of Columbia, "Congress acts as the local legislature for the District of Columbia." *District Properties Associates v. District of Columbia,* 743 F.2d 21, 27 (D.C. Cir. 1984). Once that basic fact is accepted, the District's liability for fully compensatory attorneys' fees in this case follows, independent of any liability *vel non* of the United States, for the District is fully responsible for the Barr Amendment as a matter of law.[27]

2. Even putting aside the District's direct responsibility for fees as the government entity whose law was successfully challenged, the District is liable because its Board of Elections actively enforced the Barr Amendment against the

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[27] Congress was entirely aware of what it was doing when it amended § 1983 to add the phrase "any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979). As the House Committee on the District of Columbia explained, "[t]his change makes it clear that only the District of Columbia, and not the U.S. Government, is liable for Section 1983 violations committed by District officials acting under authority of those U.S. statutes." H.R. Rep. No. 96-548 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2609, 2611.

plaintiffs. As this Court has recognized, "[f]ee awards against enforcement officials are run-of-the-mill occurrences." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739 (1980). That is true even when the enforcement officials dislike the law they are enforcing. Thus, in *Consumers Union,* fees were awarded against the Virginia State Bar as the entity that was charged with enforcing the challenged rule prohibiting attorney advertising, even though the State Bar had not enacted that rule and, indeed, had "endeavor[ed] to have the [rule] amended to conform to constitutional standards." *Consumers Union of the United States, Inc. v. American Bar Ass'n,* 505 F. Supp. 822, 823 (1981) (refusing to award fees), *rev'd by Consumers Union of the United States, Inc. v. Virginia State Bar,* 688 F.2d 218, 222 (4th Cir. 1982), *cert. denied,* 462 U.S. 1137 (1983). *Accord Kentucky v. Graham,* 473 U.S. 159, 165 (1985) ("liability on the merits and responsibility for fees go hand in hand").

Another leading case is *Venuti v. Riordan,* 702 F.2d 6 (1st Cir. 1983), written by then-Circuit Judge Breyer. There, plaintiffs sued the police chief and the Licensing Commission of Worcester, Massachusetts, asserting that a Massachusetts state statute restricting entertainment at restaurants and bars was facially unconstitutional. The Commonwealth of Massachusetts was not a party to the lawsuit; the defendants had no power to change the statute but were authorized to enforce it. Plaintiffs prevailed and were awarded fees. The defendants appealed, arguing—like the petitioner here—that the unconstitutionality of the state statute wasn't their fault and that enforcing it was their legal obligation. The court rejected their plea, noting that fees "are often assessed against defendants who enforce the laws instead of those who enact them." *Id.* at 8. The court affirmed the local defendants' sole liability for plaintiffs' full fees.

Many courts have awarded fully compensatory fees against defendants who simply enforced laws they had not enacted and perhaps disliked. *See, e.g., Martin v. Heckler,* 773 F.2d 1145, 1150 (11th Cir. 1985) ("It is also not a special circumstance sufficient to preclude a fee award against the state defendant that the state merely acted pursuant to federal regulation"), *overruled on other grounds by Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782 (1989); *Coalition for Basic Human Needs v. King,* 691 F.2d 597, 602 (1st Cir. 1982) (fees awarded against local government defendants who merely carried out state law); *Crosby v. Bowling,* 683 F.2d 1068, 1073 (7th Cir. 1982) ("fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating"); *Holley v. Lavine,* 605 F.2d 638, 643-45 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980) (fees awarded against county for administering unconstitutional state law); *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir. 1979) (fees awarded against State Board of Education although it was "merely performing [its] duty by enforcing the [state] statute"). Indeed, a contrary rule would make 42 U.S.C. § 1988 meaningless in virtually all cases challenging the constitutionality of statutes and ordinances, for the legislature is not generally a proper defendant.

There is, furthermore, no unfairness in holding the Board liable for plaintiffs' fees here. After all, plaintiffs were forced to litigate this case to final judgment not because the United States filed a *brief* defending the Barr Amendment, but because the Board of Elections continued to *enforce* the Barr Amendment against plaintiffs.

3. It may be true that the Board of Elections felt that it had little choice but to enforce the Barr Amendment until the district court had rendered judgment. But the Eighth Circuit has explained why that is no defense:

> The short answer is that governmental officials are not bound to follow [statutory] law when that law is itself unconstitutional. Quite the contrary: in such a case, they are bound *not* to follow [statutory] law. It is true that a prosecuting attorney may not know for certain whether a state law is valid or not, and that he may feel obliged to enforce the law until a determination as to its validity has been made. . . . The point of § 1988 is that such officials proceed at their peril. If in fact they are wrong, and the law they are enforcing turns out to be invalid, § 1988 puts the financial burden on the state officials. The judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law.

Carhart v. Stenberg, 192 F.3d 1142, 1152 (8th Cir. 1999), *aff'd,* 530 U.S. 914 (2000) (emphasis in original). This "short answer" applies with equal force to the situation that confronted the D.C. Board of Elections upon the enactment of the Barr Amendment.

4. Plaintiffs' failure timely to apply for fees against the United States did not relieve the Board of its liability for fees, because the Board's liability for fees under 42 U.S.C. § 1988 is not derivative of the United States' liability for fees under the entirely different standard of the Equal Access to Justice Act.[28] Indeed, plaintiffs were under no obligation even to

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[28] The United States strenuously denied liability under EAJA, *see* United States' Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, R.Doc. 51, and it is certainly possible that, even if plaintiffs had filed their EAJA application on time, the "substantially justified" standard of EAJA would have sheltered the United States from liability. Nor was that the United States' only ground for denying liability for fees. *See id.*

seek fees from the United States under that less favorable statute when they were entitled to a fully compensatory award of fees against the District under § 1988.

5. Finally, the D.C. Circuit was correct in recognizing that the strong congressional policy underlying the Civil Rights Attorneys Fees Act focuses on fairness toward successful civil rights plaintiffs, not fairness toward unsuccessful government defendants. As then-Judge Breyer explained in *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982):

> We turn finally to appellees' claim that this court should in its "discretion" withhold attorney's fees, presumably because special circumstances render the award "unjust." They base their claim on the fact that state law required them—under threat of criminal penalties—to deny the Coalition the [relief it sought] . . . .
>
> If the appellees mean this fact to show that they acted in good faith—that they felt obliged to withhold the funds and obliged to contest the Coalition's suit—we agree that they may have had good-faith reasons for their acts, but that is no reason to deny the Coalition attorney's fees. The Civil Rights Attorney's Fees Awards Act is not meant as a "punishment" for "bad" defendants who resist plaintiffs' claims in bad faith. Rather, it is meant to compensate civil rights attorneys who bring civil rights cases and win them.

Id. at 602 (citations omitted).

Petitioner's real complaint is not with the D.C. Circuit's unexceptional ruling that the technique of apportionment of

damages cannot properly be used to deprive a successful civil rights plaintiff of his statutory entitlement to a reasonable attorneys' fee. Petitioner's real complaint is with 42 U.S.C. § 1983, which makes the District of Columbia legally responsible for laws enacted by Congress without the District's consent, with the congressional determination to provide attorneys' fees to successful civil rights plaintiffs regardless of the "fault" of the losing defendant, and with the well-established doctrine that a government defendant who enforces a challenged law is liable for fees to a successful § 1983 plaintiff even if the enforcer disliked the law. But the validity of those statutes and doctrines is not before the Court, for the petitioner has never sought to challenge them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARTHUR B. SPITZER
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
(202) 457-0800

GRAHAM A. BOYD
ACLU DRUG LAW REFORM PROJECT
101 Cooper Street
Santa Cruz, CA 95060
(831) 471-9000

Attorneys for Respondents

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No. 03-1647

In the Supreme Court of the United States

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Petitioner,

v.

WAYNE TURNER, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

ROBERT J. SPAGNOLETTI
Attorney General
EDWARD E. SCHWAB
Deputy Attorney General
DONNA M. MURASKY*
Senior Litigation Counsel
**Counsel of Record*
OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA
441 4th Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667

TIMOTHY K. ARMSTRONG
STACEY H. KING
HOWREY SIMON ARNOLD & WHITE
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD IGNORE TURNER'S ATTEMPTS TO OBFUSCATE THE CLEAR LEGAL CONFLICT AMONG THE CIRCUITS 2

THE COURT SHOULD TAKE ACCOUNT OF TURNER'S FAILURE TO ADDRESS ITS POST-*HENSLEY* DECISIONS 3

REVIEW IS WARRANTED BECAUSE THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS WHICH AFFECTS MORE THAN ONE HUNDRED FEDERAL FEE-SHIFTING STATUTES 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Farrar v. Hobby, 506 U.S. 103 (1992) 4, 5

Firebird Society v. Members of Board of Fire Commissioners, 556 F.2d 642 (2d Cir. 1977) 8, 9

Hensley v. Eckerhart, 461 U.S. 424 (1983) 3, 4, 7

Herbst v. Ryan, 90 F.3d 1300 (7th Cir. 1996) 7

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 4, 5

Jones v. Espy, 10 F.3d 690 (9th Cir. 1993) 2, 7, 8

Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981) 2, 8

Turner v. District of Columbia Board of Elections and Ethics, 77 F. Supp. 2d 25 (D.D.C. 1999) 2, 6

STATUTES

42 U.S.C. § 1983 2

Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998) ... 6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

The brief in opposition filed by Wayne Turner, *et al.*, ("Turner") is principally devoted to discussing irrelevant facts and general legal principles that are not at issue in this case. Turner fails even to address this Court's jurisprudence ruling that Congress, in enacting federal fee-shifting statutes, did not intend to give the rights and interests of prevailing plaintiffs' hegemony over all other competing rights and interests. Turner also fails to rebut the analysis by the District of Columbia Board of Elections and Ethics ("the Board") which demonstrates that there is a square conflict among the Circuits over whether district courts have discretion to apportion fees when the prevailing plaintiff has suffered an indivisible injury and when one responsible party is immune or otherwise excused from fee liability.

I. The Court Should Ignore Turner's Attempts to Obfuscate the Clear Legal Conflict Among the Circuits.

Much of Turner's Opposition is devoted to red herrings. For the reasons that follow, this Court should spurn Turner's attempts to divert it from the real issue.

Turner repeatedly urges that the Board has overlooked 42 U.S.C. § 1983 and the cases which hold that local governments and officials may be held responsible for enforcing laws not of their own making. Opp. 1, 7-10, 14, 24, 26, 28-29. This is simply not true.

To the contrary, what Turner fails to understand is that enforcement is merely the necessary predicate for fee liability. It does not preclude a district court from exercising its discretion to apportion fees according to a defendant's relative responsibility for a constitutional violation and/or according to the relative time a prevailing plaintiff spent litigating against various defendants. If the Board had done nothing more than enforce the Barr Amendment, it would not be seeking relief in this Court. Here, however, the Board aligned itself with Turner from the outset of the litigation and together they secured an order allowing the Board to complete the election process with respect to Initiative 59.

Further, the Board has accepted responsibility for the fees the district court awarded in the exercise of its discretion. The Board thus stands in precisely the same posture as other non-federal defendants which have paid less than the full amount of fees courts have determined were properly awardable to a prevailing plaintiff. *See, e.g.*, *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981). The fact that municipalities and municipal agencies may be held

responsible for constitutional violations for enforcing laws not of their own making does not preclude a district court from taking into account relative responsibility and the like in apportioning fees, as the district court did in this case.

Turner also complains that the magistrate judge *sua sponte* raised apportionment. Opp. 9 & 11 n.20. *But see infra* at 5 n. 2. Even if true, Turner does not complain that he did not fully litigate this issue in the district court. More importantly, this issue was fully litigated in the D.C. Circuit and that court unequivocally ruled – in conflict with its sister Circuits – that the district court had *no discretion* to apportion fees in the circumstances of this case – where the plaintiff suffered an indivisible injury and one defendant was immune from fee liability (here, because Turner failed to file a timely fee petition against the United States).

Finally, Turner complains that the district court did not write a comprehensive opinion when it apportioned fees. Opp. 9-10. This is irrelevant. The district court was entitled to adopt the magistrate's well-reasoned legal analysis. Again, more importantly, the Board seeks review of the decision of the D.C. Circuit ruling that the district court had no discretion to apportion fees when apportionment would result in a plaintiff receiving less than a fully compensatory fee award. This is a decision that departs from the framework of its sister Circuits.

II. The Court Should Take Account of Turner's Failure to Address Its Post-*Hensley* Decisions.

Turner relies on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), in urging that the D.C. Circuit properly reversed the district court because Turner did not receive a fully compensatory fee award. Turner fails to address one other aspect of *Hensley* and this Court's post-*Hensley* decisions

ruling that a prevailing party is not necessarily entitled to such an award.

Hensley does not hold, nor has this Court ever held, that a prevailing party is entitled to a fully compensatory fee no matter what the facts. *See Hensley*, 461 U.S. at 440. Indeed, in *Hensley* itself, this Court wrote that that prevailing plaintiffs may be denied fees altogether if "'special circumstances would render such an award unjust.'" 461 U.S. at 429, quoting S. Rep. No. 94-1011, p. 4 (1976) (internal quotation marks omitted). Further, this Court has ruled that nothing in federal fee-shifting statutes gives a prevailing plaintiff "hegemony over all the other rights and equities that exist in the world," but rather that the role of the courts is to reconcile competing rights and interests. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989). *See also Farrar v. Hobby*, 506 U.S. 103 (1992) (no fee should be awarded to prevailing party who secures only nominal damages).[1]

Despite Turner's attempts to persuade this Court to the contrary, the Board does not question that the purpose of federal fee-shifting statutes is to ensure effective access to the judicial process for persons with meritorious federal claims. Rather, the Board argues that district courts are not required to apply these statutes in a mechanistic manner, but have discretion to determine the amount of an award and whether such award should be made jointly and severally or be apportioned.

This Court has clearly ruled that district courts do have discretion to determine federal fee awards and do not have to apply a mechanistic approach to such awards.

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[1] Here, as Turner concedes, his victory was, as a practical matter, pyrrhic. Opp. 2 & 4 n.5.

Turner, however, fails even to attempt to distinguish *Zipes* and *Farrar* and instead reweighs the facts himself. His reweighing, however, does not demonstrate that the district court, with the assistance of a magistrate judge, failed to render a reasonable attorney's fee award. Indeed, the district court examined all the facts of the case, including the Board's alignment with Turner and their subsequent victory against the United States.[2]

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[2] Oddly, the D.C. Circuit, although noting that "[r]esults, not litigating positions, are determinative of prevailing party status," did not acknowledge that the Board secured "the result" it sought from the outset of the litigation and thus, that it was a prevailing party. See Pet. App. 9(a). Indeed, the D.C. Circuit stated that the Board had failed to raise in the district court the argument that it too was a prevailing party and had aligned itself with Turner. Although this did not appear to be a dispositive consideration, the record shows just the opposite, both before the magistrate judge and the district court. *See, e.g.*, Docket Entry ("DE") 50 at 2 (the Board "and plaintiff have been aligned on the substantive issues throughout the proceedings."); DE 50 at 5 (The Board "**Was a Defendant In Name Only, and Cannot Be Treated as a Defendant for Purposes of Awarding Attorneys' Fees**" (Bold in original)); DE 50 at 6 ("in considering this fee request, plaintiffs' denomination of the Board as a defendant is not controlling; rather the Court is obliged to 'look beyond the pleadings and arrange the parties according to their side in the dispute'"); DE 50 at 6 ("Penetrating the plaintiffs' nominal . . . denomination of the Board . . . as a defendant leads inexorably to the conclusion that the District of Columbia was, for all practical purposes, a plaintiff here; and, as such, it is not subject to attorneys' fees and expenses as requested . . .."; D.E. 50 at 7-8; DE 79 at 4 ("The substance is that in this litigation the plaintiffs' and the Board's interests were fully aligned on . . . [, the First Amendment,] issue and that both of these parties litigated the First Amendment issue against the United States. As this Court recognized repeatedly during this case, the Board was no more than a putative defendant."); DE 79 at 5 ("Clearly, as of November 6, 1998 the Board acted as a plaintiff in pursuing the First Amendment issue"); DE 79 at 8 ("The Board asserts that allowing the plaintiffs to recover 100% of their fees against the District, which acted through most of this litigation as a co-*plaintiff*, is so patently unfair as to constitute special circumstances." (Emphasis in original)).

Turner seeks to undermine the significance of the Board's litigating posture and success by arguing that the Board did not bring its own suit challenging the constitutionality of the Barr Amendment. This is irrelevant. The Barr Amendment was enacted on October 21, 1998. Turner filed suit on October 30 and on November 6, the Board aligned itself with Turner. On November 9 the United States entered an appearance to defend the Barr Amendment. Had the Board brought its own suit, it would have been consolidated with Turner's. The fact that the Board did not "over paper" this case does not suggest that that the district court abused its discretion in declining to hold the Board liable for fees Turner incurred as the result of the actions of the United States as intervenor. Had the United States not intervened, the case would have ended much earlier than it did, and Turner (as well as the Board) would have been spared the costs of responding to the arguments of the United States. These are facts that a district court may properly take into account in awarding attorney's fees.[3]

Here, the district court quite clearly understood the Board's position. It wrote: "The parties in this case are oddly configured. The plaintiffs and the defendant are united in their argument that the Barr Amendment is unconstitutional while the intervenor argues in favor of the Amendment's constitutionality." 77 F. Supp. 2d 25, 27 n. 1 (D.D.C. 1999). The district court also granted the Board the relief it sought, a fact not mentioned by the D.C. Circuit. The D.C. Circuit, removed from the events as they unfolded, should have deferred to the district court's "'superior

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[3] In the alternative, had the Board immediately gone forward to complete the election process, this might not have changed the litigation. The United States could have urged that the issue was one that was capable of repetition, yet evading review.

understanding of the litigation ....'" Pet. App. 8a, quoting *Hensley*, 461 U.S. at 437.

III. Review is Warranted Because There is a Square Conflict Among the Circuits Which Affects More Than One Hundred Federal Fee-Shifting Statutes.

As long ago as 1996, the Seventh Circuit recognized that its sister Circuits had ruled that "*joint and several liability is not appropriate in every case involving an indivisible injury*" and that "it may be appropriate for the district court to apportion fees between an active instigator of a wrong and a more passive codefendant who had a more peripheral or ministerial role in the wrong." *Herbst v. Ryan*, 90 F.3d 1300, 1305 (7th Cir. 1996) (emphasis added). The D.C. Circuit has now ruled to the contrary.

Turner argues that the cases cited in the Board's petition are distinguishable. They are not. All approve apportionment. Further, each of the cases the Board principally relies upon holds that the district courts have discretion to apportion fees even when apportionment results in less than a fully compensatory fee for a prevailing plaintiff because a responsible party is immune or otherwise excused from fee liability.

The central question is whether the other Circuits would have affirmed the decision of the district court here, not, despite Turner's arguments, whether the facts are precisely the same in each case. As discussed in our petition, several Circuits unquestionably would have affirmed the district court's exercise of discretion here to apportion fees.

In *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993), the court affirmed apportionment between two defendants, one federal and one state, despite the resulting failure of plaintiff to collect a full award because the EAJA (Equal Access to

Justice Act, 28 U.S.C. § 2412(d)) caps fees against the United States. The Ninth Circuit found that apportionment was mandated to ensure that the state defendant was not liable for a fee award greater than the fees incurred against it. *See id.* at 691. In rejecting plaintiffs' argument that the state defendant should be held responsible for their fees in excess of the federal cap, the Ninth Circuit explained that "this is not a case in which the plaintiffs' 'full' award has been reduced; rather, it is one in which one defendant is fully liable for the attorney fees expended against it and the other is not." *Id.* Or, put another way, "because the federal defendant is not fully liable for market rates, the plaintiffs were never entitled to a full lodestar." *Id.* at 692. As applied to this case, because the federal defendant was not liable for attorney's fees, due to Turner's failure to file a timely fee petition, Turner was never entitled to a full lodestar.

Previously, in *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981), a pre-EAJA case, the Ninth Circuit upheld a district court's decision to allocate 25% of a fee award to the immune federal defendant and 75% to the state defendant. In rejecting plaintiffs' argument that the state defendant should pay the entire award, the court explained: "This is not a case of reducing fees by 25%, but rather is a case where plaintiffs are only entitled to fees for their action as against the state defendants. Since plaintiffs are not entitled to fees for their suit against the federal defendants, they cannot recover them from the state defendants." *Id.* at 1125. Given this, the Ninth Circuit quite plainly would have affirmed the district court's apportionment here.

In a footnote, Turner attempts to dismiss the holding of *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), by again claiming the facts are different and ignoring the heart of the

decision. Opp. 21 n.26. *Firebird Society* is squarely on point and just as squarely in conflict with the decision of the D.C. Circuit here. In that case, the plaintiff requested that the Second Circuit overturn a district court's determination that fees should not be wholly born by one defendant even where the plaintiff would not fully recover attorney's fees. The Second Circuit refused to find an abuse of discretion, noting that the defendant had made several important concessions early in the litigation and that it had joined with the plaintiff in opposing intervention by a third party to set aside a consent decree. *Id.* at 644. Indeed, it observed that the defendant municipality was as much a prevailing party as the plaintiffs. Similarly, the district court here awarded the Board the relief it sought and also underscored the Board's alignment with Turner.

In short, in each of the foregoing cases, the Circuits rejected Turner's successful argument in the D.C. Circuit -- "apportionment is required where it would deprive a fully successful plaintiff of a fully compensatory fee." Opp. 23. What Turner fails to understand is that the Circuits, up until this case, have found that the district courts have discretion to apportion fees even where the result is that plaintiff receives less than a fully compensatory fee award because a co-defendant is immune or an intervenor is excused from fee liability.

CONCLUSION

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT J. SPAGNOLETTI
Attorney General
EDWARD E. SCHWAB
Deputy Attorney General
DONNA M. MURASKY
Senior Litigation Counsel
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA
441 4th Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667

TIMOTHY K. ARMSTRONG
STACEY H. KING
HOWREY SIMON ARNOLD & WHITE
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner District of Columbia Board of Elections and Ethics

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